UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	)	***ELECTRONICALLY FILED***
	)	**CASE NO. 3:17-cv-00126-TMR**
	)	**The Honorable Thomas M. Rose**
PLAINTIFF-REGIONAL DIRECTOR,	)	**Magistrate Michael J. Newman**
v.	)	
MIKE-SELL'S POTATO CHIP CO.,	)	**REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND OTHER EXPENSES**
DEFENDANT-RESPONDENT.	)	

Defendant-Respondent Mike-sell's Potato Chip Company ("Mike-sell's" or "Company") files this Reply in Support of its Motion for Attorneys' Fees, Costs, and Other Expenses ("Motion"). In opposing the Company's Motion, Plaintiff-Petitioner National Labor Relations Board ("NLRB"), including Garey Lindsay, Eric Taylor, Linda Finch, and Naomi Clarke, acting in their official capacities (collectively "Petitioner"),[1] articulates no reasonable factual or legal basis for its Petition for 10(j) Injunction ("Petition")—particularly when its request for relief was so grossly overbroad that not even the Administrative Law Judge ("ALJ") adopted it. While Petitioner showed "reasonable cause" under Section 10(j) of the National Labor Relations Act ("NLRA"), this alone does not prove the Petition was "substantially justified." To avoid an award under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §§ 1920, 2412, Petitioner must also have been "substantially justified" in believing its Petition as a whole was "just and proper." It is clear from the undisputed facts and controlling law that Petitioner cannot make this showing. In fact, Petitioner was so willfully reckless in its investigation and so blatantly vindictive in its request for relief that a full award of fees, costs, and expenses—above the EAJA cap—is warranted under 28 U.S.C. § 1927 and this Court's inherent authority.

I. Petitioner did not prove its Petition was "substantially justified" so as to avoid an EAJA award.

Like a complaint's signature and verification requirements, the EAJA's "substantially justified" test is a "think twice" prescription that "stem[s] the urge to litigate irresponsibly." *Scarborough v. Principi*, 541 U.S. 401,

[1] Eric Taylor did not attend the hearing in this matter, but he was listed on this Court's Docket as a "Lead Attorney" and an "Attorney to be Noticed." Conversely, Naima Clarke represented Petitioner at the hearing in this matter, though she was not listed on this Court's Docket as representing Petitioner.

416 (2004) (internal cites omitted). It shifts the burden to the government to prove that its position was "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *Glenn v. Commr. of Soc. Sec.*, 763 F.3d 494, 498 (6th Cir. 2014) (internal cites and quotes omitted). This interpretation "accords with related uses of the term 'substantial,' and is equivalent to the 'reasonable basis both in law and fact' formulation adopted by the vast majority of Courts of Appeals." *Pierce v. Underwood*, 487 U.S. 552, 553 (1988).

If a 10(j) petition lacks factual or legal support due to a failure to adequately investigate, evaluate evidence, and/or develop the record, then the NLRB's position is not "substantially justified."[2] In one case where EAJA fees were awarded after 10(j) relief was denied, the court explained as follows:

> [T]he [NLRB] did not present evidence of egregious or extraordinary unfair labor practices. Moreover, [the NLRB] relied on a generalized argument that a § 10(j) injunction was "just and proper" because (1) this case was a successorship case, and (2) other courts had granted temporary injunctions in successorship cases. The evidence [the NLRB] did cite from the transcript was largely insufficient to support [its] argument or actually contradicted [its] argument. . . . For example, . . . the [NLRB] alleged that some "Preferred employees" were "coerced . . . to reveal that they aid Union dues." However, . . . [t]he evidence cited by the [NLRB] shows that five applicants were questioned, directly or indirectly, about their Union membership, but no employee was coerced or felt coerced into talking about their Union membership or Union support. Although the [NLRB] asserts that the [employer] coerced job applicants to reveal Union membership, "coercion" implies a use of force or a threat to compel the person to act. Absolutely nothing in the record . . . indicates that the interviewers did anything more than ask and no applicant testified that he or she felt compelled or threatened to reveal Union membership or support." . . . No reasonable person, with knowledge of the facts and the law . . . would find the [NLRB's] position was substantially justified.

NLRB v. Ridgewood Health Care Ctr., Inc., No. 6:14-CV-2075-SLB, 2016 WL 2894105, at *4 (N.D. Ala. May 18, 2016) (emphasis in original) (some internal cites and quotes omitted). Just as in *Ridgewood Health Care*, no reasonable person who diligently investigated the facts of this case and studied the Sixth Circuit law could view the Petition as "just and proper." The inability to elicit any evidence to support the Petition's allegations suggests either that Petitioner failed to properly investigate, or that Petitioner grossly misrepresented the facts it acquired through investigation. Either way, the result is the same: the Company's Motion should be granted because Petitioner failed to prove its conclusory allegations and overbroad request for relief were "substantially justified."[3]

---

[2] *See, e.g.*, *NLRB v. MSK Corp.*, 84 Fed. Appx. 115, 116 (2d Cir. 2003) (upholding EAJA award where NLRB conducted inadequate investigation before filing 10(j) petition); *Fraction v. U.S. Dep't of HHS*, 859 F.2d 574, 575 (8th Cir. 1988) (upholding EAJA award due to "the government's failure . . . to evaluate all the evidence . . . and to fully develop the record"); *U.S. v. Estridge*, 797 F.2d 1454, 1458 (8th Cir. 1986) (upholding EAJA award where "the government did not diligently investigate who was responsible for [unpaid payroll] taxes" and instead "brought claims against several officers and directors of [the employer] . . . who might possibly have been responsible for collecting or paying . . . [the] taxes, hoping that the court would ultimately find one or more of those individuals liable").

[3] *See, e.g.*, *MSK*, 84 Fed. Appx. at 116 (upholding EAJA award because NLRB's failure to fully investigate meant 10(j) petition was not "substantially justified"); *Fraction*, 859 F.2d at 575 (upholding EAJA award due to government's failure to evaluate evidence according to circuit precedent); *Estridge*, 797 F.2d at 1458 (upholding EAJA award where government did not diligently investigate).

A. Despite its rudimentary showing of "reasonable cause," Petitioner had no reasonable basis in law or fact to believe the Petition was "just and proper."

Petitioner emphasizes its showing of "reasonable cause" and urges this Court to consider its Petition "as an inclusive whole" in deciding whether it was "substantially justified." (ECF 26, pp. 4-5.) Of course, "while part of the government's case may have merit, it is still plausible that its position as a whole lacks substantial justification." *EEOC v. Memphis Health Ctr., Inc.*, 526 Fed. Appx. 607, 614-15 (6th Cir.2013).[4] Compared to "reasonable cause," the "just and proper" inquiry is a much higher hurdle to 10(j) relief. Common sense dictates that, as to 10(j) petitions, the "just and proper" element weighs more heavily and carries greater impact than "reasonable cause." This is evidenced by the fact that "reasonable cause" findings are overturned for "clear error," whereas "just and proper" findings are upheld absent an "abuse of discretion." *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 236-37 (6th Cir. 2003) (internal cites omitted). That is, while courts cannot require more than "relatively insubstantial" evidence of "reasonable cause," they have full discretion to decide if 10(j) relief is "just and proper." *Gottfried v. Frankel*, 818 F.2d 485, 493-94 (6th Cir.1987).[5] Thus, courts need not accept "relatively insubstantial" evidence at the "just and proper" stage; they may instead fully evaluate the nature of the allegations, the sufficiency of the proof, the development of the record, the parties' motivations, the scope of requested relief, the competing interests at stake, the purposes of the NLRA, and the extent to which interim relief is necessary.

Petitioner concedes 10(j) relief is "just and proper" only "when preservation or restoration of the pre-unfair labor practice status quo . . . is necessary to protect the fundamental purposes of the [NLRA] and the NLRB's remedial power." (ECF 26, pp. 5-6.) This required Petitioner to show <u>actual evidence</u> of (1) what specific effects the alleged unfair labor practices had; (2) how those effects eroded support for the Union; (3) why the alleged violations could not be effectively remedied through normal NLRB proceedings; and (4) why the need for interim relief outweighed the harm to Mike-sell's and third parties. *NLRB v. DHSC, LLC*, 5:13 CV 1538, 2014

[4] *See also Rodriguez v. United States*, 542 F.3d 704, 712 (9th Cir. 2008) (upholding EAJA award and noting that "it is unnecessary to find that every aspect of a case is litigated by a party in bad faith in order to find bad faith by that party").

[5] *See also Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988) (recognizing that "[t]he inquiry whether injunctive relief is 'just and proper' is committed to the discretion of the trial judge" and that "[t]he district court abuses its discretion only when it relies upon clearly erroneous findings of fact or when it improperly applies the law or uses an erroneous legal standard").

WL 296634, at *2 (N.D. Ohio Jan. 24, 2014) (requiring evidence that "creates a reasonable apprehension that the efficacy of the [NLRB]'s final order may be nullified, or the administrative procedures . . . rendered meaningless").

Petitioner fails to explain its inability to support the Petition's claims that interim relief was required to end "a serious flouting of the Act;" that the sale of routes would "irreparably undermine employee support for the Union" and "severely erode the 'prestige and legitimacy' of the Union;" that, "[b]y the time the Board issues the final order . . . it will be too late to preserve employee choice and for the Union to regain its lost support" because "employees will predictably shun the Union;" that at least two drivers quit "because they believe [Mike-sell's] will continue to unilaterally eliminate bargaining unit jobs;" and that, "employees feel that the Union is extremely weak and expect that [Mike-sell's] will continue to sell more routes and further decimate the unit." (ECF 1, p. 7; ECF 1-1, pp. 5, 13.) Petitioner's own witnesses admitted that a host of wholly-unrelated issues related to NLRB Case No. 09-CA-094143—unsuccessful contract negotiations, lengthy compliance proceedings, incorrect/inflated backpay figures, and denials of Union appeals—were the true source of drivers' frustration. (ECF 17, pp. 21-24, 33-34, 36, 38, 51-60, 68-74, 76-82, 84-95.) Not a single witness confirmed that any drivers quit due to the sale of routes. Indeed, "all but two of the employees affected by the sales are still working for Mike-sell's," and "[t]he two drivers who left the Company did so by choice—one because he did not like the traffic on his new route, and the other because he found a 'better job.'" (ECF 17, pp. 25-26, 33-34, 52-53, 60, 73-74; ECF 18, p. 16.)

Petitioner's Response relies on this Court's Order in arguing that driver frustration was due to "multiple causes, including the unilateral sale of routes." (ECF 26, p. 6 (citing ECF 18, p. 18).) But drivers did not testify that they were frustrated with the sale of routes *per se*, nor did this Court make findings to that effect. (ECF 17, pp. 51-53, 59-61.) Drivers instead "described dissatisfaction with the changes in the routes they service" because "it is taking longer to service their territories," and "the additional money is not sufficient to compensate for the longer hours." (ECF 18, p. 18.) Thus, if drivers were upset by the sale of routes, they were upset with the effects

of the sales—not the sales themselves.[6] It is undisputed that Mike-sell's offered to bargain over any effects from the sale of routes, but the Union declined.[7] (ECF 5-1, ¶¶ 17, 20, 23-24; ECF 17, p. 74-75.)

Petitioner's Response also cites generalized "disappointment" voiced by Route Sales Driver Robert Hauefle ("Hauefle") in arguing "there was evidence of imminent harm to the Union's status as . . . bargaining representative." (ECF 26, p. 7.) This transparent attempt to conflate drivers' anger at Mike-sell's with anger at the Union is unavailing. The record reflects that Hauefle specifically denied any frustration with the Union; that he "wanted to give the Union the opportunity to run through the process;" that Union representatives "were doing all they could do;" and that he "give[s] the Union the benefit of the doubt because they are working for [him]." (ECF 17, pp. 70-71.) Hauefle also admitted the real impetus for drivers' frustration was unsuccessful contract negotiations, ongoing proceedings in NLRB Case No. 09-CA-094143, and global settlement discussions—having "nothing to do . . . with the sale of the routes." (ECF 17, pp. 68, 72-73.) Route Sales Driver Jerry Lake ("Lake") likewise admitted that Union meetings in late 2016 and early 2017 were scheduled to discuss specific issues related to NLRB Case No. 09-CA-094143, including the status of contract negotiations, the parties' global settlement proposals, and the Union's option to appeal reduced backpay figures in pending compliance proceedings. (ECF 17, pp. 54-58.) Lake confirmed that, at these Union meetings, drivers complained about the delay "with regard to the other Board case," as well as the huge letdown that occurred "when the Union posted a backpay estimate" later found to be vastly overstated (thus necessitating appeal discussions). (ECF 17, pp. 57-58.)

Petitioner disingenuously asserts "a reasonable factual basis to conclude that Mike-sell's intended to continue selling routes," purportedly from the Company's statement that "it was moving away from its in-house distribution business."[8] (ECF 26, pp. 7-8.) Petitioner claims "it was only at the [10(j)] hearing that Mike-sell's

---

[6] Petitioner's presentation of this "effects" testimony is highly suspect, as drivers had akready blamed a different cause for their increased hours, insisting they resulted from a "change to the commission structure." (Ex. 1 – Second Affidavit, ¶ 5 and Att. A at p. 2.) Months before the Petition was filed, Petitioner had expressly rejected the argument that drivers should get more pay for extra hours, as it was "unaware of any legal precedent which would permit it to account for additional hours worked, especially where the affected employees are paid only by commission, not an hourly rate." (Ex. 1 – Second Affidavit, ¶ 5 and Att. A at p. 3.) Given drivers' shifting explanations for their increased workload, Petitioner had no good faith basis to trust their newly-articulated argument other than to give them a "second bite at the apple."

[7] This is not to say Mike-sell's would necessarily agree to pay drivers for working more hours after their routes changed, as bidding provisions apply in the event of route eliminations, and it is undisputed that those bidding provisions were followed. (ECF 5-1, ¶ 24.) The point is, at the 10(j) hearing, drivers testified only about concerns related to the perceived effects of the route sales, which is a matter over which Mike-sell's had always offered to bargain.

[8] In its Memorandum in Support of the Petition, Petitioner argued that "interim relief is just and proper here because, given respondent's stated intent to continue moving away from the distribution side of its business, there is a palpable risk that no route sales drivers will be left in the unit," whereas "[r]estoring the status quo in the instant case and ordering respondent to bargain . . . will allow the remedial benefits . . . to reach route sales drivers before their positions have all been eliminated . . . ." (ECF 1-1, p. 15 (emphasis added).)

first produced evidence indicating it never intended to completely cease its in-house distribution . . . because such a move would result in a significant pension liability." (ECF 26, p. 8.) But Petitioner has known since the 2013 hearing in NLRB Case No. 09-CA-094143 that Mike-sell's "face[s] a significant penalty of approximately $20 million if it opt[s] to withdraw from the pension plan altogether." *Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 142 at fn.8 (2014) (citing JD-40-13 issued 6/18/13). Given that Mike-sell's cannot afford to withdraw from the pension plan, Petitioner cannot credibly claim "reasonable apprehension" that Mike-sell's would "completely cease its in-house distribution," thereby triggering the cost-prohibitive withdrawal liability. Moreover, during its investigation, Petitioner did not express or imply any fear that all Company routes would be sold, nor did Petitioner bother to ask if Mike-sell's had such an intent. Petitioner simply challenged the routes sold in 2016—the only sales to which the Union objected in five years—so Mike-sell's had no reason to affirmatively disavow its future intent at the investigation stage. Only once the Petition was filed did Petitioner suddenly take an apocalyptic tone, insisting Mike-sell's would "continue to sell more routes and further decimate the unit." (ECF 1-1, p. 5.) Mike-sell's cannot be faulted for failing to answer questions that were never asked. This blame lies exclusively with Petitioner, who either conducted a woefully inadequate investigation, or strategically remained willfully blind to exculpatory evidence that effectively stifles some of the Petition's most dramatic and exaggerated claims.

Petitioner cites *Boren v. Cont'l Linen Serv., Inc.*, 2011 WL 2261537 (W.D. Mich. June 8, 2011) ("*Boren II*"), arguing that EAJA awards are unwarranted if reasonable minds may disagree about whether 10(j) petitions are "substantially justified" due to "substantial conflicting and ambiguous evidence." (ECF 26, pp. 4, 8.) In *Boren II*, the facts and the law were indeed complicated, and the 10(j) petition was denied in major part.[9] The employer then filed an EAJA motion, which the court also denied based on the following rationale:

> After a full . . . hearing, the ALJ was unable to state with any certitude which entity was the § 9(a) bargaining representative. Although . . . the NLRB failed to meet its burden . . . the ALJ specifically cautioned that "[t]his should not be interpreted as encompassing a finding that any particular entity was, or was not, the Section 9(a) representative." * * * This was a complicated case with substantial conflicting and ambiguous evidence and very little case law directly addressing the situation presented. On review it appears that, even if the ALJ correctly concluded that the NLRB failed to show, by a preponderance of

[9] In *Boren II*, the employer's workforce had been represented by Local 151 of the LDCIU ("Local 151") for 20 years, although there was no evidence Local 151 was certified by the NLRB as the exclusive representative. *Boren v. Cont'l Linen Serv., Inc.*, 2011 WL 2261537, at *3 (W.D. Mich. June 8, 2011) ("*Boren II*"). At some point, Local 151 merged with the UNITE union, who informed members that the Chicago Joint Board of UNITE ("Joint Board") would help to represent them. *Boren v. Cont'l Linen Servs., Inc.*, 2010 WL 2901872, at *1 (W.D. Mich. July 23, 2010) ("*Boren I*"). The UNITE union later merged with the HERE union, thereby forming UNITE HERE. *Boren II* at *3. The Joint Board eventually disaffiliated from UNITE HERE, and thereafter, the Joint Board and UNITE HERE each claimed to be the exclusive bargaining representative for the employer's workforce. *Boren I* at *1; *Boren II* at *2.

> the evidence, that the Joint Board was the § 9(a) bargaining representative, the NLRB has shown that it had "reasonable cause" to believe that it was [for purposes of its 10(j) petition before this court].

Boren II at *3-4. Thus, while the evidence in *Boren II* may have been riddled with conflict and complicated by the absence of applicable law, this case is so vastly different from *Boren* that it defies comparison.

In short, Mike-sell's agrees with Petitioner that the "just and proper" inquiry turns on "a complex balancing of equitable considerations." (ECF 26, p. 5.) But contrary to Petitioner's claims, this is not a case involving "substantial conflicting and ambiguous evidence" or "factual issues on which reasonable minds may differ." (ECF 26, pp. 4-5, 8.) There was no ambiguity or conflicting evidence presented at the 10(j) hearing. The only "conflict" was the huge discrepancy between the Petition's conclusory allegations and the witnesses' actual testimony, which was steadfast and consistent in its wholesale inability to validate Petitioner's position. The hearing resulted in a clear factual record, on which any reasonable person could draw but one conclusion: the Petition was not remotely close to being "just and proper" because the sale of routes in 2016 did not actually erode—or even threaten to erode—Union support.[10] Petitioner plainly failed to adequately investigate the facts, evaluate the evidence, and/or develop the record, so its Petition was not substantially justified.

B. The record is particularly devoid of evidence to "substantially justify" Petitioner's patently overbroad request for relief.

Noticeably absent from Petitioner's Response is an explanation for the grossly excessive relief sought by the Petition—especially given the hardship it posed to Mike-Sell's and innocent third parties. Petitioner spends three pages of its Response arguing that it "reasonably weighed the harms to employees' collective bargaining rights more heavily than harms to Mike-sell's and third parties." (ECF 26, pp. 9-12.) But it is well-settled that "the Sixth Circuit does not consider harm to employees when determining whether a § 10(j) injunction is just and proper." *Boren v. Cont'l Linen Servs., Inc.*, 2010 WL 2901872, at *4 (W.D. Mich. July 23, 2010) ("*Boren I*") (citing *NLRB v. Automatic Sprinkler Corp. of Am.,* 55 F.3d 208, 214 fn.5 (6th Cir.1995) ("[W]e do not consider the degree of irreparable harm to the unions and employees in § 10(j) determinations in this Circuit."). Rather, Section 10(j)'s "just and proper" prong required Petitioner to prove its specific request for relief was narrowly tailored to that "reasonably necessary to preserve the ultimate remedial power of the Board and [was] not . . . a

[10] After all, Mike-sell's has unilaterally sold over three dozen routes since November 2012, and there is no allegation that these prior sales resulted in a loss of Union support. (ECF 5-1, ¶ 17.)

substitute for the exercise of that power." *NLRB v. Voith Indus. Servs., Inc.*, 551 Fed. Appx. 825, 833 (6th Cir. 2014). In denying the Petition, this Court opined that Petitioner sought "an extremely broad injunction that would effectively provide all of the relief that it might obtain from the [NLRB]." (ECF 18, p. 15 (emphasis added).) And yet, the Petition's request for relief was so extreme that even the ALJ's recommended remedy fell short of its demands. *See Mike-sell's Potato Chip Co.*, Case 09-CA-184215, 2017 WL 3225835 (NLRB Division of Judges, July 25, 2017) (attached as Ex. 1 – Second Affidavit, ¶ 6 and Att. B).)

Contrary to the Petition, while the ALJ recommended Mike-sell's be required to bargain over "proposed changes" in terms and conditions of employment "including, but not limited to . . . the sale of company sales routes," the ALJ did not recommend an overall affirmative bargaining order requiring Mike-sell's to "bargain collectively with the Union . . . with respect to rates of pay, wages, hours of employment and other conditions of employment, and if an agreement is reached, embody the agreement in a signed document." (*Compare* ECF 1, p. 10 (emphasis added) *with* Ex. 1 – Second Affidavit, ¶ 6 and Att. B, pp. 27-32.) It is axiomatic that "[t]here are generally two categories of cases from which an affirmative bargaining order may issue: precertification election cases and incumbent union withdrawal cases." *NLRB v. Goya Foods of Florida*, 525 F.3d 1117, 1129 (11th Cir. 2008). This case involves neither scenario. Moreover, Petitioner failed to support its request for an affirmative bargaining order with "a reasoned explanation" that "recognize[s] the competing considerations which are potentially affected by the remedy chosen, [is] grounded in factual determinations rather than speculation, and explain[s] how, in light of present circumstances its remedy can be expected to effectuate the purposes of the [NLRA]." *Goya Foods*, 525 F.3d at 1129 (citing *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 45-46 (D.C.Cir.1980).) Here, Petitioner had no reason whatsoever to ask this Court for an affirmative bargaining order forcing Mike-sell's to immediately bargain with the Union for a successor agreement—except to punish the Company for exercising its rights to assert yet-to-be-litigated defenses and to decline the Union's past global settlement demands in ongoing compliance proceedings in NLRB Case No. 09-CA-094143.[11]

[11] Petitioner essentially admits the impermissible objectives that motivated its request for an affirmative bargaining order, insisting: "An incumbent union needs the support of the employees it represents . . . to bargain effectively. Thus, absent an interim bargaining order, there will be no meaningful collective bargaining after a final Board decision . . . . The need for interim relief is heightened where, as here, [Mike-sell's] has failed to rescind prior unlawful, unilateral changes and thus has already weakened the Union in the eyes of bargaining unit employees. If allowed to continue, these unilateral changes could severely erode the 'prestige and legitimacy' of the Union in the eyes of the employees. . . . Thus, [Mike-sell's] is still litigating the 2014 Board order in compliance and the remedial benefits . . . are still pending. In the meantime, . . . [r]estoring the status quo in the instant case and ordering [Mike-sell's] to bargain . . . will allow the remedial benefits of the prior Board order to reach route sales drivers . . . ." (ECF 1-1, pp. 13-15.)

Also contrary to the Petition, as for the Notice of Employee Rights ("Notice"),[12] the ALJ did not recommend Mike-sell's be required to "(a) hold a mandatory employee meeting . . . scheduled to ensure the widest possible employee attendance, at which the [posting] will be read . . . by a responsible management representative . . . in the presence of a Board agent; (b) announce the meeting for the reading in the same manner it would customarily announce a meeting of employees; (c) require that all employees . . . attend the meeting; and (d) have [Petitioner's] prior approval of the time and date of the meeting . . . for the reading . . . and . . . of the content and method of the announcement to employees of the reading . . . ."[13] NLRB precedent confirms that Notice readings are only proper "where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion, or where the violations in a case are egregious." *U.S. Postal Serv.*, 339 NLRB 1162, 1163 (2003) (refusing to order a Notice reading even when employer ignored over three dozen information requests during a 90-day period, and despite employer's "history of . . . failing to provide requested information at many locations over the past two decades"). Again, Petitioner had no reason to ask this Court for a Notice reading based on the specific violations alleged in the Petition—unless, of course, Petitioner relied on the 2012 violation (and ongoing compliance proceedings in NLRB Case No. 09-CA-094143 that have yet to confirm whether the terms of the Expired Contract must continue past June 2013) to "trump up" the otherwise isolated allegations in 2016.[14]

Petitioner claims the ALJ's finding that Mike-sell's violated Section 8(a)(5) "necessarily" means the Petition was "substantially justified" as to "reasonable cause." (ECF 26, p. 5.) If this is true, logic dictates that the ALJ's failure to recommend certain relief sought by the Petition "necessarily" means it was not "substantially justified" as to the "just and proper" inquiry. *See NLRB v. Express Pub. Co.*, 312 U.S. 426, 435-37 (1941) (vacating part of an overbroad injunction); *Gottfried*, 818 F.2d 485 (same). Because the law clearly instructs that

---

The impropriety of an affirmative bargaining order is perhaps best evidenced by the fact that Petitioner excluded this overbroad request from its Proposed Remedy submitted to the ALJ in NLRB Case No. 09-CA-184215. (Ex. 1 – Second Affidavit, ¶ 7 and Att. C.)

[12] If this Court had granted the Petition, the Court's Order would have served the same as a standard NLRB-issued Notice, which must be posted in conspicuous locations within a workplace in order to notify employees of their rights, as well as any remedial actions required of the employer.

[13] The impropriety of a Notice reading is perhaps best evidenced by the fact that, although Petitioner initially included this same overbroad request in its underlying NLRB Complaint, Petitioner subsequently abandoned its request for a Notice reading in the Proposed Remedy submitted to the ALJ in NLRB Case No. 09-CA-184215. (*Compare* ECF 1 at Ex. 3, p. 5 *with* Ex. 1 – Second Affidavit, ¶ 7 and Att. C.)

[14] It is well-recognized that "[i]solated and episodic actions are generally not subject to injunction." *NLRB v. Teamsters Local 695*, 1989 WL 165246, at *7 (W.D. Wis. June 26, 1989) (citing *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943)).

10(j) injunctions must be narrowly tailored to the alleged violation, and that overbroad injunctions are not permitted, Petitioner should have known its request for 10(j) relief was not "substantially justified." *NLRB v. Teamsters Local 695*, 1989 WL 165246, at *9 (W.D. Wis. June 26, 1989) (denying overbroad 10(j) relief because "[e]very injunction should be carefully tailored to permit legal activity while eliminating illegal labor practices and their coercive effects"); *Morio v. N. Am. Soccer League*, 501 F. Supp. 633, 640 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 217 (2d Cir. 1980) (requested relief was carefully tailored to avoid industry chaos and economic hardship).

C. The cases cited in Petitioner's Response only serve to highlight just how excessive, overreaching, and unnecessary the Petition really was.

In arguing the Petition was "substantially justified," Petitioner amasses a hodgepodge of caselaw markedly inapposite and distinguishable from this case. (ECF 26, pp. 6-8, 11.) Some of the cited cases do not involve 10(j) petitions at all.[15] For those that are 10(j) cases, even a cursory review of their analysis warns against filing the Petition. Among the chief distinctions shared by these cases are (a) extremely egregious and rampant claims of antiunion animus and discrimination under Section 8(a)(3) of the NLRA; and/or (b) independent (i.e., non-derivative) interference allegations under Section 8(a)(1) of the NLRA. In each case, the NLRB had a reasonable basis to defend its petition as "just and proper," with actual evidence to corroborate horrendous claims of extensive and widespread erosion of union support. Noticeably absent from Petitioner's Response, however, is a citation to any case where the NLRB sought (much less obtained) 10(j) relief for an isolated 8(a)(5) claim standing alone—without 8(a)(3) allegations of antiunion animus or independent 8(a)(1) allegations of interference.

Pages 4 and 8 of the Response cite *Boren II*, 2011 WL 2261537, where a 10(j) petition alleged the employer violated Sections 8(a)(1) and (5) of the NLRA by barring competing unions from its premises, refusing to provide relevant information, and refusing to bargain for a new contract. *Boren I*, 2010 WL 2901872, at *1. Based on actual evidence presented,[16] the court issued limited 10(j) relief allowing the union most likely to have majority support to access the plant to process grievances and represent employees under the terms of the expired

[15] *See, e.g., IUOE v. NLRB*, 426 F.2d 1243, 1246 (D.C. Cir. 1970) (examining purpose of NLRB's cease-and-desist remedy as measure to ensure meaningful bargaining—but not involving court-issued 10(j) bargaining order or any analysis of "just and proper" standard).

[16] To show erosion of union support, the NLRB presented testimony that one competing union—likely to have majority support—tried to hold an off-site meeting. *Boren I*, at *5. The union handed out flyers advertising the meeting and accusing the employer of denying access to the plant and refusing to process grievances. *Id.* Only six of 84 employees attended the meeting, and testimony indicated poor attendance was due to the employer's threats to fire anyone who took a union flyer, which the employer said was "all lies." *Id.* Employees also testified to being unsure if they even had a union, with some believing a "fake union" was "just taking [their] dues." *Id.*

contract. *Id.* at *6. But despite blatant interference, the *Boren I* court did not issue an affirmative bargaining order or require a response to union information requests, such as Petitioner sought from the Court in this case. *Id.*

Page 6 of the Response cites *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23 (1st Cir. 1986), where a 10(j) petition alleged the employer violated Sections 8(a)(1), (3), and (5) of the NLRA by engaging in flagrant behaviors designed to discourage union activity. The court granted a 10(j) injunction, finding the actual evidence of flagrant and intentional misconduct justified the burden imposed on the employer.[17] *Id.* Again, the *Asseo* facts are highly distinguishable from those alleged by Petitioner in this case.

Page 7 of the Response cites *Sheeran v. Am. Comm'l Lines, Inc.*, 683 F.2d 970 (6th Cir. 1982), where a 10(j) petition alleged the employer violated Sections 8(a)(1), (2), (3), and (5) of the NLRA by interfering with union activities, discriminating against union members, urging employees to file decertification petitions, and repudiating the union hiring hall and union access provisions of the labor contract. *Id.* at 972. The court granted some—but not all—of the 10(j) relief requested based on live testimony from at least eight witnesses who provided specific examples of the employer's antiunion animus.[18] *Id.* at 972-73, 979-80. In contrast, Petitioner presented no evidence of such blatant 8(a)(1) interference or 8(a)(3) discrimination here.

Page 7 of the Response next cites *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270 (7th Cir. 2001), a successorship case alleging violations of Sections 8(a)(1), (3), and (5) of the NLRA. *Id.* at 275. The trial court's denial of 10(j) relief was reversed based on testimony from over a dozen witnesses that the employer's discriminatory hiring was designed to oust the incumbent union. *Id.* at 290.[19] The Seventh Circuit recognized that the NLRB's remedial authority could not cure the harm that would occur absent interim relief because, while the NLRB could order "reinstatement" for employees the employer refused to (re)hire due to antiunion animus, the reality was that those rejected employees would move on to other jobs. *Id.* at 299. Meanwhile, the (re)hired

[17] The employer allegedly interrogated and discharged employees, and even threatened them with physical harm, because they supported the union. *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 24-25 (1st Cir. 1986). These allegations were not just baseless claims in the petition; they were supported by the live testimony of numerous employees. *Id.* at 28.

[18] The witnesses' testimony revealed that four employees were ejected from the worksite due to union membership; supervisors twice urged members of the incumbent union to join a different union; two supervisors eavesdropped on private talks between employees and union representatives; another supervisor attended a union meeting, and employees were afraid to ask him to leave; yet another supervisor told employees the union was "no good;" still another supervisor told employees he had a duty to make it "tough" on union members because of the upcoming contract expiration; and one other supervisor told employees the union was a "rip-off." *Sheeran v. Am. Comm'l Lines, Inc.*, 683 F.2d 970, 979-80 (6th Cir. 1982).

[19] The NLRB "relie[d] upon direct evidence, rather than circumstantial evidence of antiunion animus" to prove its 10(j) petition was "just and proper." *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 290-91 (7th Cir. 2001) (emphasis added).

employees were without the advocacy of their union, and the combined "deprivation to employees from the delay in bargaining and the diminution of union support [was] immeasurable." *Id.* Unlike *Bloedorn*, Petitioner did not present any direct evidence of antiunion animus here—much less testimony from more than a dozen witnesses.

Pages 7-8 of the Response cites *Frankl v. HTH Corp.*, 650 F.3d 1334 (9th Cir. 2011), where a 10(j) petition alleged the employer violated Sections 8(a)(1), (3), and (5) of the NLRA by coercively interrogating employees; maintaining an overbroad nonsolicitation policy; engaging in objectionable pre-election conduct before two elections; bargaining in bad faith; firing five union bargaining committee members; and making unilateral changes after withdrawing recognition from the union. *Id.* at 1340-41, 1359, 1361. The court issued 10(j) relief based on concrete facts from a fully-developed record adduced over 13 days of testimony. *Id.* at 1341, 1363. The court noted that interim reinstatement of the five discharged union bargaining committee members was particularly important due to their daily contact with unit employees and their ability to judge the impact of various bargaining proposals on their constituents. *Id.* at 1363. Again, no discrimination or bad-faith bargaining is alleged here.

Pages 9 and 11 of the Response cites *Morio*, 632 F.2d 217, where a 10(j) petition alleged the employer violated Sections 8(a)(1), (3), and (5) of the NLRA by refusing to bargain with the union while soliciting, negotiating, and executing individual contracts with employees. *See* 501 F. Supp. At 637. The employer's own admissions provided sufficient evidence its practices would "render the NLRB's processes 'totally ineffective' by precluding a meaningful final remedy." *See* 632 F.2d at 218. However, no claims of direct dealing exist here.

Page 10 of the Response cites *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979), arguing Petitioner reasonably concluded that Mike-sell's could restore the routes. In *Levine*, the employer sold two trucks to discourage unionization, discharged one employee, and retained independent contractors after a contentious work stoppage. *Id.* at 434. The court found reasonable cause to believe the employer violated Sections 8(a)(1), (2), (3) and (5) of the NLRA. *Id.* at 435. But the court did not require the employer to restore any routes; the court instead enjoined the employer only from selling trucks in the future. *Id.* at 435-36. Here, not only has Petitioner not raised a claim that Mike-sell's intended to discriminate against the Union by selling routes, but Petitioner's demand for the retroactive restoring of routes (which would result in interference with third-party contracts) cannot be compared to a prospective, temporary injunction against selling trucks.

Pages 10 and 11 of the Response next cites *Fleischut v. Nixon Detroit Diesel, Inc*., 859 F.2d 26 (6th Cir. 1988), where the NLRB sought 10(j) relief forcing the employer to discharge current employees and rehire former ones. *Id.* at 30, fn.3. The district court denied that relief but failed to enumerate the reasons restoration was not just and proper. *Id.* at 31. The Sixth Circuit thus remanded the case for further explanation of the court's decision. *Id.* at 31. Obviously, the *Fleischut* facts were far different than those in this case, where Petitioner sought to force Mike-sell's to rescind contracts, reacquire equipment, and (re)staff routes vacated by natural attrition.

Page 11 of the Response cites *Voith*, 551 Fed. Appx. 825, where the Sixth Circuit upheld denial of 10(j) relief, which would have included unseating incumbent employees. *Id.* at 833. The district court declined to order 10(j) relief because, "[r]ather than seek[ing] a return to the *status quo*, the [NLRB] [sought] affirmative injunctive relief to right the perceived wrongs." *NLRB v. Voith Indus. Services, Inc.*, 906 F.Supp.2d 667, 672 (W.D.Ky.2012). Accordingly, while recognizing that 10(j) relief may include restoration in a proper case, *Voith* ultimately supports this Court's finding that Petitioner was not seeking to return to the *status quo*, but was instead seeking "all of the relief that it might obtain from the [NLRB]." (ECF 18, p. 15.)

Page 11 of the Response also cites *Maram v. Universidad Interamericana De Puerto Rico, Inc*., 722 F.2d 953 (1st Cir. 1983), where the NLRB presented substantial evidence—both circumstantial and direct—that the employer fired its entire staff and subcontracted their work to thwart a union drive in violation of Sections 8(a)(1) and (3) of the NLRA.[20] *Id.* at 955. The court emphasized that "discharge of the entire workforce in the face of unionization, is far more serious . . . than a case where only a handful of selected organizers is involved." *Id.* at 959. The court specifically noted that, without 10(j) relief, "[t]he union . . . may well be done for." *Id.* Again, *Maram* is distinct from the instant case, where Petitioner offered no evidence that employees were discharged or laid off, that antiunion animus existed, or that Union support had eroded specifically due to the sale of routes.

Finally, Page 11 of the Response cites *Overstreet v. El Paso Disposal, L.P.*, 668 F. Supp. 2d 988 (W.D. Tex. 2009), *aff'd as modified*, 625 F.3d 844 (5th Cir. 2010), where, during an unfair labor practice strike, the employer permanently replaced strikers, declined unconditional offers to return to work, and withdrew recognition from the union. *Id.* at 997, 1010-11. The court issued 10(j) relief ordering the strikers be returned to work because,

[20] For example, employees specifically testified that they were forced to attend mandatory meetings where they were interrogated about their union activity and distribution of union cards. *Id.* at 956.

absent injunctive relief, the "meager support the Union currently enjoy[ed] [would] dissipate before the Board reache[d] the merits." *Id.* at 1011. *Overstreet*, then, cannot be compared to the instant case in any way.

In short, the caselaw cited in Petitioner's response suggests that 10(j) relief is "just and proper" in only the most egregious of circumstances—which are not present here. Unlike the cases explained above, Petitioner raises no stand-alone interference allegations against Mike-sell's under Section 8(a)(1). Moreover, the Union affirmatively withdrew its Section 8(a)(3) claim before the Petition was even filed. (Ex. 1 – Second Affidavit, ¶ 7 and Att. C.) Based on cases cited in its Response, Petitioner should have known it would be difficult—if not impossible—to show that its requested relief was "just and proper" absent concrete evidence proving the erosion of union support. Because Petitioner possessed neither a factual nor legal basis to believe its Petition was "just and proper," an EAJA award is warranted pursuant to 28 U.S.C. §§ 1920 and 2412.

II. Based on the actions of Petitioner's counsel, this Court may grant an award under 28 U.S.C. § 1927 and/or its inherent authority, as such awards are not barred by sovereign immunity.

Petitioner claims sovereign immunity bars awards under § 1927, as well as awards issued pursuant to this Court's inherent authority. (ECF 26, p. 14-16.) The law suggests otherwise. When government officers raise sovereign immunity defenses, courts commonly express various versions of the following sentiment:

> [A]n attorney in the employ of the government is not on the same footing as a private attorney. He or she has the august majesty of the sovereign behind his or her every utterance; the economic power in the hands of some . . . government lawyers can wreak total devastation on the average citizen. As a result, the attorney representing the government must be held to a higher standard than . . . the ordinary lawyer.

NLRB v. Ehrlich Beer Corp., 687 F. Supp. 67, 69-70 (S.D.N.Y. 1987) (emphasis added) (rejecting sovereign immunity defense and granting fee awards under EAJA, Rule 11, and Local Rules).

The EAJA confirms the government is "liable for [attorneys'] fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b) (emphasis added). The EAJA's sovereign immunity waiver makes clear that Petitioner's counsel enjoy no protection from an award under § 1927, which states "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required . . . to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[21] *Milner v. Biggs*,

[21] At least two district courts have recognized that the EAJA may waive sovereign immunity as to awards under 28 U.S.C. § 1927 and common law, although in each case the facts did not ultimately support such awards. *Overstreet v. Farm Fresh Co. Target One, LLC*, CV-13-02358-PHX-NVW, 2014 WL 4371427,

566 Fed. Appx. 410, 413 (6th Cir. 2014) (citing 28 U.S.C. § 1927); *Rentz v. Dynasty Apparel Indus.*, 556 F.3d 389, 396 (6th Cir. 2009). The EAJA's sovereign immunity waiver likewise precludes Petitioner and its counsel from avoiding an award pursuant to this Court's inherent authority. *See, e.g., Rodriguez v. U.S.*, 542 F.3d 704, 709 (9th Cir. 2008) ("the EAJA's explicit incorporation of the common law in its attorney's fees provision is a clear indication that" the government is subject "to the same standard of good faith that [the court] demand[s] of all nongovernmental parties"); *see also Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988) ("§ 2412(b) waives sovereign immunity as to Rule 11 sanctions"). Indeed, where the government fails to prove its position is substantially justified and acts in bad faith, courts should issue awards under both the EAJA and § 1927 or common law. *See, e.g., Filipponio v. U.S.*, 1986 WL 1871 (N.D. Ill. Jan. 17, 1986) (awarding fees under EAJA and § 1927); *Rodriguez*, 542 F.3d at 709-10, 712 (permitting awards under EAJA and court's inherent authority).

Moreover, "Section 1927 applies only to counsel in litigation, not to parties." *Alexander v. F.B.I.*, 541 F. Supp. 2d 274, 299 (D.D.C. 2008). Mike-sell's has named the individual counsel to which a fee award should apply, and those individuals have been provided notice and an opportunity to be heard. *See Alexander*, 541 F. Supp. at 299. The Sixth Circuit adopted the analysis in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) to determine when sovereign immunity applies to officers. *TAA Corp. v. Settle. Capital Corp.*, 489 F.3d 256, 260 (6th Cir. 2007) (citing *Larson*). The *Larson* Court confirmed that a suit requesting specific relief against an officer would not implicate sovereign immunity where the officer's actions are *ultra vires*:

> There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. . . . On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . . His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

See 337 U.S. at 689–90. Here, the actions of Petitioners' counsel were clearly *ultra vires* because, by filing the Petition without support, they did not do the business for which the NLRB is empowered. Rather, their failure to fully investigate was contrary to ethical and legal requirements and their authority as officers of the NLRB. Thus, Petitioner's counsel may not rely on sovereign immunity to avoid an award under § 1927.

---

at *4 (D. Ariz. Sept. 4, 2014) (recognizing that 28 U.S.C. § 2412(b) may allow awards under 28 U.S.C. § 1927 and common law, but awarding only EAJA fees of $55,739.76 based on facts presented); *Glasser ex rel. N.L.R.B. v. Comau, Inc.*, 10-13683, 2011 WL 3706557, at *2 (E.D. Mich. Aug. 23, 2011) (recognizing that 28 U.S.C. § 2412(b) may allow awards under 28 U.S.C. § 1927 and common law, but declining such awards based on facts).

With sovereign immunity waived, it is clear an award under § 1927 is warranted because Petitioner's counsel "objectively f[ell] short of the obligations owed by a member of the bar . . . and . . . cause[d] additional expense to the opposing party." *Milner*, 566 Fed. Appx. at 413 (emphasis added). Petitioner's counsel need not subjectively believe the Petition was improper, as "a finding of bad faith is not a necessary precondition under Sixth Circuit caselaw to a determination of § 1927 sanctionability." *Dubuc v. Green Oak Tp.*, 482 Fed. Appx. 128, 134 (6th Cir. 2012) (emphasis added); *Dixon v. Clem*, 492 F.3d 665, 679 (6th Cir. 2007). Rather, a § 1927 award requires "more than negligence or incompetence" but "less than subjective bad faith," given that such an award is intended to deter abuse of judicial process. *Milner*, 566 Fed. Appx. at 413.[22]

Mike-sell's has clearly articulated the requisite legal and factual basis for an award of fees under § 1927 and this Court's inherent authority. The Sixth Circuit has held that attorneys act "unreasonably and vexatiously" when they bring actions and make representations based on little to no evidence. *See, e.g.*, *Breezley v. Hamilton County*, 674 Fed. Appx. 502, 507 (6th Cir. 2017) (counsel acted unreasonably and vexatiously when she incorrectly claimed to have served defendants but offered no evidence of service); *Dubuc*, 482 Fed. Appx. at 134 (upholding § 1927 award where plaintiff had no factual basis to believe defendant was liable); *Jones v. Illinois C. R. Co.*, 617 F.3d 843, 856 (6th Cir. 2010) (upholding § 1927 award where plaintiff recklessly denied allegations before investigating). Further, where counsel learns in litigation that its claims are meritless but continues to pursue them, § 1927 sanctions are warranted. *See, e.g.*, *Milner*, 566 Fed. Appx. at 413.

Here, counsel's claim that 10(j) relief was "just and proper" was completely meritless, and they acted recklessly in failing to fully investigate before filing the Petition. Counsel's lack of investigation was plain from their record evidence. None of counsel's witnesses testified that the sale of routes caused Union support to erode such that injunctive relief was necessary to preserve the Board's remedial power. Instead, the evidence showed that Union employees were angry at Mike-sell's for various unrelated reasons. Even after the 10(j) hearing—during which no evidence was adduced in support of the Petition—counsel continued to pursue its meritless injunction, rather than withdrawing the Petition. Counsel's decision to proceed with the Petition as written—and without even bothering to narrow Petitioner's scope of requested relief—despite the utter lack of evidence and

[22] *See also Red Carpet Studios v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006); *see also In re Keegan Mgmt. Co. Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996) (a party "multiplies proceedings" where it engages in "unnecessary filings and tactics").

clear failure to investigate, represents an objective failure to comply with the obligations owed by members of the bar to the Court and each other. Because counsel's reckless behavior caused Mike-sell's to incur excessive and unnecessary expense, sanctions should be awarded to deter such an abuse of judicial process in the future.

III. It is reasonable for this Court to grant Mike-sell's an award in the total amount requested.

While "a prevailing party is not entitled to recover for 'hours that are excessive, redundant, or otherwise unnecessary,'" *Escobar v. Colvin*, 2015 WL 4041845, * 6-7 (N.D. Ohio July 1, 2015), "a district court will always retain substantial discretion in fixing the amount of an EAJA award."[23] *Hyatt v. North Carolina Dep't of Human Res.*, 315 F.3d 239, 254 (4th Cir.2002). Here, the Court has full discretion to award Mike-sell's fees for all time entries that are not so unrelated, excessive, or duplicative as to justify exclusion. *NLRB v. Fed. Sec., Inc.*, 2002 WL 31017644, at *7 (N.D. Ill. Sept. 9, 2002) (granting $62,250.47 EAJA award in 10(j) action).

Petitioner claims Mike-sell's included time entries for work unrelated to defending the Petition (ECF 26, pp. 19-20; ECF 26-1, pp. 1-4), but this is not supported by the facts or law. As Petitioner correctly deduced, Mike-sell's included the disputed entries because the work was performed in response to Petitioner's threat to seek 10(j) relief. Certainly, litigation includes preventative measures—like settlement negotiations and mitigation efforts—so courts will award attorneys' fees incurred before the filing of a claim when such fees "directly relate" to the subject of the litigation. *See, e.g., Metro. Van and Storage, Inc. v. U.S.*, 101 Fed. Cl. 173, 193 (Fed. Cl. 2011). Petitioner should have known its threat of 10(j) relief would prompt Mike-sell's to act quickly in response.[24] The Company's actions in attempting to prevent 10(j) litigation, and in preparing in advance to defend it—including strategy sessions, conference calls, and position statements—would not have been necessary absent Petitioner's initial threat and ultimate decision to file the Petition. Needless to say, Mike-sell's would have preferred not to engage in this costly legal exercise. But it would have been foolish to sit idly by and do nothing when Petitioner threatened injunctive relief that would be extremely burdensome and harmful to Mike-sell's and third parties.

[23] For example, if this Court saw fit to give Petitioner some "credit" for its "reasonable cause" showing, the Court could "adjust the amount of fees for various portions of the litigation, guided by reason and the statutory criteria." *Commr., I.N.S. v. Jean*, 496 U.S. 154 (1990).

[24] Indeed, if Mike-sell's had not taken this threat seriously before the Petition was filed—yet still filed its Motion upon prevailing in the 10(j) action—Petitioner would have undoubtedly argued that the Company "failed to mitigate its damages" by sharing its evidence and arguments with the NLRB upon request, in a good faith effort to convince Petitioner not to file the Petition in the first place. The certainty of this would-be argument is best demonstrated by the fact that Petitioner did not hesitate to blame its faulty investigation on the Company's failure to answer questions it never bothered to ask (e.g., whether Mike-sell's had any plans to sell off all Company routes in order to completely discontinue its in-house distribution). (ECF 26, pp. 7-8.)

Hence, the Company's preventative measures and advance trial preparation were both "directly related" to the Petition and entirely reasonable. *Ridgewood Health Care*, 2016 WL 2894105 at *4 ("To the extent that [the pre-petition] hours can be attributed to the civil action, they are permissible under the EAJA.").

Petitioner contends the Company's time entries are "excessive" and "duplicative" because more than one attorney drafted the briefs. (ECF 26, pp. 21-22; ECF 26-1, pp. 4-7.) Multiple attorneys sharing overlapping work is "common" law-firm practice and is "not inherently unreasonable." *The N.E. Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 704-05 (6th Cir. 2016); *Noell v. Colvin*, 2016 WL 3952114, at *3 (N.D. Ohio July 22, 2016) (granting EAJA fees and finding nothing unreasonable about two attorneys working on and billing for same case).[25] That similar work was performed by several attorneys is not, in itself, a basis for reducing time billed. *Smith v. Commr. of Soc. Sec.*, 2015 WL 7774549, at *3 (N.D. Ohio Nov. 9, 2015), *adopted at* 2015 WL 7779222 (N.D. Ohio Dec. 2, 2015). An attorney's newness to a case may also justify extra hours for him or her to get up-to-speed. *See McWilliams v. Commr of Soc. Sec.*, 2010 WL 2597864 at *4 (N.D. Ohio June 7, 2010), *adopted at* 2010 WL 2597802 (N.D. Ohio June 24, 2010).

Mike-sell's should not be penalized for investing in thorough briefs that secured its desired outcome at each step of the case. *See Hoover v. Colvin*, 1:14-CV-2483, 2016 WL 7048311, at *4 (N.D. Ohio Dec. 5, 2016) (counsel should not be penalized for choosing, at outset of case, to front-load time to secure desired outcome). Most time billed on the Opposition to Petition was for work by "JLB" and "JRA." (ECF 20-5 at Att. 1, pp. 1-6.) JLB is a junior associate who was new to the case and needed time to get up-to-speed. (ECF 20-5, Ex. B, ¶ 10.) Plus, Petitioner's belated efforts to avoid a hearing on its own Petition caused further expense. (ECF 10; ECF 10-1.) By filing a Motion for Adjudication on Affidavits, Petitioner required Mike-sell's to invest more time and resources in briefing. Only JLB and JRA worked on the Response in Opposition, and they spent relatively few hours doing so. (ECF 20-5 at Att. 1, pp. 6-8.) It cannot seriously be argued that Mike-sell's is not entitled to fees for responsive briefs prompted by Petitioner's own filings. Furthermore, "a party who prevails in fee litigation

[25] *See also Koelling v. Colvin*, 2016 WL 1161338, *1, 3 (N. D. Ill. Mar. 24, 2016) ("As for the government's arguments that staffing the case with multiple attorneys . . . was inefficient, courts have found it entirely appropriate and within the realities of the market that senior attorneys guide and review the work of junior attorneys."); *Shaffer v. Colvin*, 2014 WL 185779 at *4 (N.D. Ohio Jan. 16, 2014) ("[I]t is common practice for at least two attorneys to work on the same file."); *Shah Bros. v. U.S.*, 32 F.Supp.3d 1348, 1351, 36 ITRD 1389 (Ct. Int'l Trade 2014) ("objection[s] to the reasonableness of work performed by a junior and senior attorney working together [are] unpersuasive," as "it is the rule rather than the exception to have a junior and senior attorney working together on a matter"); *Reed v. Astrue*, 2010 WL 669619, *3 (N.D. Ill. Feb. 19, 2010) ("it is entirely appropriate (and indeed reflects the realities of the market) that a senior attorney will guide and advise a junior attorney rather than take the laboring oar with respect to researching and drafting briefs").

under EAJA may recover fees for legal services rendered during the fee litigation." *Scarborough*, 541 U.S. at 419 fn.6 (internal cites omitted). Only JLB and JRA worked on the pending EAJA Motion and this Reply, and they spent about 116 hours doing so.[26] (ECF 20-5 at Att. 1; Ex. 1 – Second Affidavit, ¶ 8 and Att. D.) *Compare Metro. Van*, 101 Fed. Cl. at 201 (time billed for EAJA briefing reduced from 126.4 hours to 126.3 hours). Hence, EAJA litigation is properly included in the Company's claim for fees. *See id.* at 200-01. Petitioner presents no evidence—and there is no reason to believe—time charged by JLB, JRA, and CFB represents anything more than that required to effectively and successfully represent the Company at each stage of the 10(j) litigation.

Notably, Company counsel attempted to minimize fees by assigning the bulk of drafting to JLB, a junior associate. The rates requested reflect counsel's efforts to mitigate expenses, and are neither excessive nor unusual. Law firms regularly base hourly rates on the experience of the working attorney. A junior associate with less experience (i.e., JLB) is billed out at a lower rate than a senior partner (i.e., RSC) because it is expected the junior associate will require more time, research, and oversight to complete the same work. This is a universally-understood truth in the legal services industry that allows for the cost-efficient staffing of cases. *Bolchoz v. Astrue*, 2012 WL 601899, *1 (D.S.C. Feb. 23, 2012) (EAJA time entries were reasonable and did not reflect unnecessary duplication, as "the practice of a less expensive junior attorney working on a file under the watchful eye of a more senior attorney is often economically efficient and the Government should not attempt to dictate how [private] attorneys . . . manage their practices"). Here, JLB, CFB, and JRA spent the vast majority of time defending the Petition and briefing the EAJA Motion. JLB was billed out at an already-discounted rate of $205 per hour, while JRA and CFB were billed out at an already-discounted rate of $325 per hour. (Ex. 1 – Second Affidavit, ¶¶ 3, 11-12 and Att. D.) Had all work been performed by RSC, it would likely have been completed more efficiently,

[26] Petitioner suggests that Company counsel's time spent on the EAJA Motion was excessive just because it exceeds the 13.6 hours deemed excessive in *Photo Data, Inc. v. Sawyer*, 533 F. Supp. 348, 353 (D.D.C. 1982). Like most cases cited in Petitioner's Response, *Photo Data* is easily distinguishable. For starters, the case is 35 years old—only two years into EAJA's then-temporary enactment—when "[t]he judiciary ha[d] yet to settle" on basic statutory interpretations. *See Spencer v. NLRB*, 712 F.2d 539, 546 (D.C. Cir. 1983). The *Photo Data* court provides no description as to the length or complexity of the fee application, which is unavailable for review online. What is readily apparent, however, is that *Photo Data* involved extremely basic events over a short period that are best summarized thusly: plaintiff was one of several contractors to respond to a GPO request-for-proposal seeking "the lowest responsible bidder;" plaintiff was the lowest bidder, but did not get the contract "due to a nonresponsibility finding;" plaintiff immediately filed a written protest of the nonresponsibility determination, asked that the contract be stayed, and filed a complaint for declaratory and injunctive relief; prior to any evidentiary hearing, plaintiff dismissed its action because the GPO agreed to rescind its previous award and re-evaluate plaintiff's eligibility; one month later, the contract was awarded to plaintiff, who filed an application for fees. *Id.* at 349-50. Because *Photo Data* settled even before the temporary injunction hearing took place, there was indeed little to brief, as there was no evidentiary record. The circumstances in *Photo Data* therefore stand in stark contrast to this case, which involved evidence of events over a 15-year period, involved significant pretrial briefing, and resulted in a day-long evidentiary hearing.

but at the commensurately higher rate of $520 per hour—more than twice JLB's rate, and more than one-and-a-half times the rates of JRA and CFB.[27] (ECF 20-5, Ex. B, ¶ 12.) Thus, Company counsel's actual hourly rates—above the EAJA cap—are entirely reasonable and justified under 28 U.S.C. § 1927.

Petitioner also claims that some time entries are "inadequately documented" or "insufficiently detailed." (ECF 26, pp. 21-22; ECF 26-1, pp. 4-7). A party need not state with great detail the nature of every time entry—such as breaking down time spent drafting issue-by-issue—to be entitled to relief.[28] *See Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) ("counsel, of course, is not required to record in great detail how each minute of his time was expended" but rather "should identify the general subject matter of his time expenditures").[29] Here, counsel sufficiently identified the general subject matter of each time expenditure so the Court can determine how the time was spent. *See, e.g.*, *Metro. Van*, 101 Fed. Cl. at 194 (internal cites omitted). Hence, Petitioner's claim that Mike-sell's is not entitled to fees because its records lack specificity is without merit.[30]

CONCLUSION

For the foregoing reasons, pursuant to 28 U.S.C. §§ 1920, 1927, 2412, and the Court's inherent authority, Mike-sell's respectfully requests its Motion be granted in full, with the Court awarding reasonable attorneys' fees in the amount of $110,605.50 and litigation costs and expenses in the amount of $1,786.60.[31] (Ex. 1 – Second Affidavit, ¶¶ 8, 10 and Att. D; *see also* ECF 20-5 at Att. 1.) In the alternative, Mike-sell's respectfully requests its Motion be granted to such extent as deemed justified by this Court.

Respectfully submitted,

/s/ Jennifer R. Asbrock
Jennifer R. Asbrock (Ohio #0078157)

[27] *See Beardsley v. Astrue*, 2011 WL 3566930, *1–2 (E.D. Wis. Aug. 15, 2011) (noting that "[t]here was a substantial cost savings by counsel's use of law clerks in addition to attorneys," because "[h]ad all services been completed by attorneys, their higher rate would have offset much of any reduction in total hours billed for all work").

[28] Nevertheless, out of an abundance of caution, Company counsel has attempted to perform an issue-by-issue breakdown for purposes of this Reply Brief. (Ex. 1 – Second Affidavit, Att. D.)

[29] *Kling v. U.S. Dep't of HHS*, 790 F.Supp. 145, 152 (N.D. Ohio 1992) ("the [government] complains that counsel spent an excessive amount of time in preparation for hearings and in drafting certain briefs," but "[t]his Court will not second-guess counsel about the amount of time necessary to achieve a favorable result for his client").

[30] Additionally, the Company is entitled to fees for time spent drafting this Reply Memorandum. *See Noell v. Colvin*, 1:14CV1894, 2016 WL 3952114, at *4 (N.D. Ohio July 22, 2016) ("Plaintiff correctly contends that this Court ordinarily awards fees for time spent preparing EAJA reply briefs without requiring more detailed itemization for the EAJA reply brief.")

[31] These updated fees and costs reflect additional charges incurred since the filing of the Company's Motion, which are associated with reviewing Petitioner's Response in Opposition and preparing this Reply Brief.

jasbrock@fbtlaw.com
Catherine F. Burgett (Ohio #0082700)
cburgett@fbtlaw.com
Jennifer L. Bame (Kentucky #96953)
jbame@fbtlaw.com
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
Telephone: (502) 779-8630
Facsimile: (502) 581-1087
Counsel for Mike-sell's Potato Chip Co.

CERTIFICATE OF SERVICE

I hereby certify that Defendant-Respondent's Reply Memorandum in Support of Motion for Attorneys' Fees, Costs, and Other Expenses was electronically filed with the U.S. District Court for the Southern District of Ohio by using the CM/ECF system, which will send a notice of electronic filing to the following on this 1st day of September, 2017:

Garey E. Lindsay, Regional Director
Eric A. Taylor, Counsel for the Regional Director
Linda Finch, Counsel for the Regional Director
Naima Clarke, Counsel for the Regional Director
National Labor Relations Board Region 9
John Weld Peck Federal Building
550 Main Street, Room 3003
Cincinnati, Ohio 45202-3271
(via email at Eric.Taylor@nlrb.gov)
(via email at Linda.Finch@nlrb.gov)
(via email at Naima.Clarke@nlrb.gov)

John R. Doll, Counsel for Charging Party
c/o Doll, Jansen, Ford & Rakay
111 W. First St., Suite 1100
Dayton, Ohio 45402-1156
(via email at jdoll@djflawfirm.com)

David P. Boehm, Office of the General Counsel
c/o National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
(via email at David.Boehm@nlrb.gov)

/s/ Jennifer R. Asbrock
Jennifer R. Asbrock
Counsel for Mike-sell's Potato Chip Co.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	*ELECTRONICALLY FILED*
PLAINTIFF-REGIONAL DIRECTOR,	**CASE NO. 3:17-cv-00126-TMR The Honorable Thomas M. Rose Magistrate Michael J. Newman**
v.	
MIKE-SELL'S POTATO CHIP CO.,	**SECOND AFFIDAVIT OF JENNIFER ASBROCK IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND OTHER EXPENSES**
DEFENDANT-RESPONDENT.	

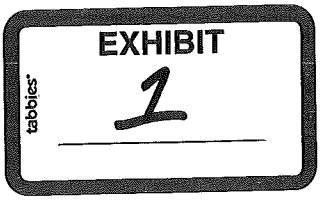
The Affiant, Jennifer Asbrock, after first being duly sworn, hereby states and affirms the following:

1. My name is Jennifer Asbrock. I am of lawful age, and I am competent to attest to the facts stated in this Affidavit, which are true, correct, and based on my own personal knowledge.

2. I am a member of the State Bars of Ohio (#0078157) and Kentucky (#96436) and a Member with Frost Brown Todd LLC, the law firm retained to represent Defendant-Respondent Mike-sell's Potato Chip Company ("Mike-sell's" or "Company") in defense of the Petition for 10(j) Injunction ("Petition") filed by Plaintiff-Petitioner National Labor Relations Board ("NLRB"), as well as Garey Lindsay, Eric Taylor, Linda Finch, and Naomi Clark, acting in their official capacities on behalf of Region 9 of the NLRB (collectively "Petitioner"),[1] seeking to force Mike-sell's to engage in decisional bargaining and produce information requested for that purpose to Charging Party International Brotherhood of Teamsters, Local Union No. 957 ("Union").

3. I have been practicing law since 2004, and my practice has been devoted exclusively to the areas of labor and employment law. I was primarily responsible the above-captioned case for Mike-sell's. I have been involved in all aspects and decisions regarding the defense of this litigation, and I have both supervised the work other attorneys and paralegals and have myself performed a significant portion of the

[1] Eric Taylor did not attend the hearing in this matter, but he was listed on this Court's Docket as a "Lead Attorney" and an "Attorney to be Noticed." Conversely, Naima Clark represented Petitioner at the hearing in this matter, although she was not listed on this Court's Docket as representing Petitioner.



work on this matter, including communicating with client representatives and opposing counsel and drafting various pleadings and legal memoranda in connection with this case. My billing rate on this case has been $325 per hour.

4. I have personal knowledge of the matters set forth herein. My personal knowledge is based upon my personal observations and personal participation in the events described below, as well as my review of the business records of Frost Brown Todd LLC, which are kept in the ordinary course of business. During the period since Frost Brown Todd LLC was retained for this matter, Mike-sell's has been charged and has agreed to pay on an hourly basis for the legal services rendered relating to the defense of this case.

5. Attachment A is a true and complete copy of the written Compliance Determination that was requested by the Union and that was issued by Petitioner in NLRB Case No. 09-CA-094143 on December 12, 2016.

6. Attachment B is a true and complete copy of the ALJ Decision issued in NLRB Case No. 09-CA-184215 on July 25, 2017.

7. Attachment C is a true and complete copy of the Notice of Withdrawal of the Union's 8(a)(3) allegation issued by Petitioner in NLRB Case No. 09-CA-184215 on March 13, 2017.

8. Attachment D to this Affidavit is an itemized statement of the legal services, including attorneys' fees, costs, and expenses, for which Mike-sell's agreed to pay in connection with its EAJA Motion in this civil action for the time period from July 28, 2017, to September 1, 2017. The itemization indicates the dates on which legal services were provided or costs and expenses were incurred, the attorney who provided the service or incurred the cost/expense, the type of legal services provided or costs/expenses incurred, the time expended at the applicable billing rate, and the amount of the fees and costs/expenses charged to Mike-sell's.

9. I reviewed the time and charges set forth in the itemized Frost Brown Todd LLC's statements, and I believe the time spent and costs incurred in this matter were reasonable and necessary under the circumstances. I exercised billing judgment to eliminate duplicative attorney and paralegal time entries, as well as to reduce time entries that could be viewed as excessive, duplicative, or that did not add noticeable value to the legal work. As explained below, I also exercised billing judgment to apply a $20-per-hour discount on the hourly

rates of one Member and one Associate working on this matter. Attachment A was created from invoices that were sent to and paid by Mike-sell's, as well as more recent time entries that are still pending in the billing process. It reflects a true and accurate itemization of attorney and paralegal time spent, and costs and expenses incurred in connection with the Company's EAJA Motion in this civil action for the time period from July 28, 2017, to September 1, 2017, less time entries and costs/expenses eliminated or reduced in my exercise of billing judgment.

10. Upon combining the entries on Pages 1-9 of ECF 20-5 and Attachment D to this Affidavit, the total discounted time billed to Mike-sell's by Frost Brown Todd LLC for this entire litigation equates to 383.3 hours, totaling discounted fees in the amount of $110,605.50 (reflecting reduced billing rates and eliminated time entries described above) accrued through September 1, 2017. As set forth in Pages 10-11 of ECF 20-5, the total costs and expenses incurred in defending this civil action equate to $1,786.60.

11. Catherine Frost Burgett is a Member with Frost Brown Todd LLC. She is a member of the State Bar of Ohio (#0082700) and has been practicing law since 2007, primarily in the area of labor and employment law. To promote efficiency, Ms. Burgett performed a substantial amount of the legal research and initial drafting related to Mike-sell's Memorandum in Opposition to the Petition and other related pleadings and legal memoranda necessitated by the Petition and related filings of the NLRB and Union. Her billing rate on this case has been $315-$325 per hour.[2]

12. Jennifer Bame is an Associate with Frost Brown Todd LLC. She is a member of the State Bars of Kentucky (#96953) and Florida (Inactive #0111892) and has been practicing law since 2014. To promote efficiency, Ms. Bame performed a substantial amount of the legal research and initial drafting related to Mike-sell's Memorandum in Opposition to the Petition and other related pleadings and legal memoranda necessitated by the Petition and related filings of the NLRB and Union. Her billing rate on this case has been $205 per hour, which reflects a $20 per-hour discretionary discount from her standard billing rate.

[2] Ms. Burgett's billing rate on this case in March 2017 was $325 per hour, which already reflected a $10 per-hour discretionary discount from her standard billing rate. Once it became clear that Ms. Burgett would devote significant time to the defense of this civil action from a briefing perspective, in April 2017, I exercised my discretion to further reduce her billing rate to $315 per hour on a prospective basis, to account for the need to staff this case with two Members.

13. The billing rates that Frost Brown Todd LLC charged Mike-sell's on this matter were reasonable and generally below the average rates charged by attorneys in the same geographic area with similar education and experience. (ECF 20-5 at Attachment 2.)

14. If the Court is not inclined to award the full amount of the already-discounted attorneys' fees, costs, and expenses described in this paragraph 10 of this Affidavit pursuant to 28 U.S.C. § 1927 and the Court's inherent authority, then Mike-sell's alternatively seeks fees in the further reduced amount of $75,893.40 under the EAJA, which equates to $198 per hour for 383.3 hours billed by attorneys, and $160 per hour for 1.8 hours billed by a paralegal.[3]

AFFIANT FURTHER SAYETH NAUGHT.

Jennifer R. Asbrock, Esq.
Counsel for Mike-sell's Potato Chip Company

STATE OF KENTUCKY)
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by Jennifer R. Asbrock on this 1st day of September, 2017.

Notary Public, State at Large

My Commission Expires: 8/4/2021

0130693.0640708 4823-9286-4332v1

[3] This reflects the statutory maximum rate of $125 per hour under the Equal Access to Justice Act ("EAJA"), with adjustments to account for increases in the cost of living since March 1996. *See, e.g., Sorenson v. Mink*, 239 F.3d 1140, 1145, 1148 (9th Cir. 2001) (citing 28 U.S.C. § 2412(d)(2)(A) and explaining calculation methodology for adjusting rates based on current consumer price index for urban consumers). The billing rate of $198 per hour is the maximum statutory rate permitted under the EAJA for 2016,[3] calculated by the federal government, and appears on the National Transportation Safety Board website at www.ntsb.gov/legal/Documents/EAJA-maximum-rates.pdf (Last accessed June 26, 2017). (ECF 20-5 at Attachment 3.)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 9
550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Agency Website: www.nlrb.gov
Telephone: (513)684-3686
Fax: (513)684-3946

December 12, 2016

JOHN R. DOLL, ESQ.
DOLL, JANSEN & FORD
111 W FIRST ST, SUITE 1100
DAYTON, OH 45402-1156

Re: MIKE-SELL'S POTATO CHIP COMPANY
Case 09-CA-094143

Dear Mr. Doll:

This letter provides you with the basis for my Compliance Determination regarding the remedies in the Board's Order, enforced by the United States Court of Appeals for the District of Columbia Circuit, in the above mentioned case. If you disagree with the Compliance Determination set forth in this letter, you have the right, pursuant to Section 102.53 of the Board's Rules and Regulations, to appeal my Determination to the General Counsel and then to the Board. The appeal procedure is explained below.

The Court Order: The Court, in its December 11, 2015 Judgment, enforced the Board's Order which concluded that Mike-Sell's Potato Chip Co. (Respondent) on or about November 19, 2012, unilaterally implemented its full and final offers for the warehouse and driver units without first bargaining with General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957 (Union) to a good-faith impasse. The Board ordered Respondent to, *inter alia*, take the following affirmative action:

(a) On request of the Union, restore, honor and continue the terms of the collective-bargaining agreements with the warehouse and drivers units that expired on October 26 and November 17, 2012, respectively, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

(b) Make employees in the warehouse and drivers bargaining units whole for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful unilateral implementation of its full and final offers on November 19, 2012, with interest, as provided for in the remedy section of this decision.

(c) Make contributions, including any amounts due, to any funds identified in the warehouse and drivers unit collective-bargaining agreements that expired on October 26 and November 17, 2012, and which Respondent would have paid but for the unlawful unilateral changes, as provided for in the remedy section of this decision.

ATTACHMENT
A

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) File with the Regional Director a sworn certification of a responsible official attesting to the steps Respondent has taken to comply.

The Compliance Determination: On September 30, 2016, the Region issued a Compliance Specification alleging a total amount of backpay of $327,554. This amount was based, in part, on projected sales figures. After careful consideration of additional records of actual sales obtained subsequent to the issuance of the compliance specification, the Region has now determined that backpay for the employees in this matter is $209,609 ($153,881 in Pension Deductions, $2,545 in Commission, $7,800 in Stop Pay, and $43,128 in Sick Pay) as calculated from November 17, 2012 through June 25, 2016, and $14,709 in interest, and $2,255 in excess taxes as calculated through December 31, 2016. The Region intends to issue an amended compliance specification following the disposition of any compliance appeal filed in this matter.

In determining the amount of Pension Deductions owed to each employee, the weekly deduction amount was added for each week the employee worked and each week of vacation the employee was paid for based on payroll records provided by Respondent.

The following method was used to determine the commission backpay owed to each route sales employee. The Region first determined the total commission backpay owed to all route sales employees by applying the established commission structure set forth in the appropriate expired collective bargaining agreement to Respondent's recorded gross sales figures. The Region then subtracted the total commission amount actually paid to all the route sales employees from the total commission backpay owed. The resulting net total commission backpay owed was apportioned to each individual route sales employee based on each employee's percentage of the total commission amount actually paid.

In determining the amount of Stop Pay owed to each Over-the-Road employee, $20 was added for each stop not paid by Respondent during the backpay period, based on Stop Pay records provided by Respondent.

In determining the amount of Sick Pay owed to each Route Sales employee, the amount owed for each sick day paid was added to the amount owed for 3 additional sick days employees were owed for each year. The amount owed for each sick day already taken or paid for, was calculated by taking the amount Respondent should have paid for each sick day and subtracting the amount actually paid for each sick day. The amounts Respondent should have paid and did pay were provided by Respondent.

I understand at this time that the Union challenges the Region's calculation of backpay, specifically as it relates to commission-related backpay for route sales drivers, because the Union argues the Region should account for route sales drivers working more hours as a result of the unlawful unilateral change to the commission structure. Put differently, the Union believes that, as a result of the unilateral change to commission structure, route sales drivers are being required

to work several hours per day longer to make the same amount of commission they would have made but for Respondent's unlawful unilateral change.

The Administrative Law Judge's Decision and Order, as affirmed by the Board, and enforced by the Court, requires the Board to calculate backpay in this matter according to the formula articulated in *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. by *NLRB v. Ogle Protection Service, Inc.*, 444 F.2d 502 (6th Circuit 1971). In *Ogle*, the Board determined that in cases like the instant matter where there has not been a cessation of work, the appropriate backpay formula assesses the entire backpay period as a whole, not on a quarterly basis. As such, the Region here is required to analyze whether route sales drivers lost commissions based on the entire backpay period as a whole without using a quarterly determination. Furthermore, the instant matter only involves the unlawful unilateral change to the commission structure, not an allegation that route sales drivers' work has decreased, or increased, since the unilateral change to how commissions are calculated. Consequently, in making the commission-related backpay calculations, the Region is tasked with computing the difference in commission owed under the pre-implementation terms and what has been paid to route sales drivers during the backpay period based on the amount of work performed. In this circumstance, the Region is unaware of any legal precedent which would permit it to account for additional hours worked, especially where the affected employees are paid only by commission, not an hourly rate.

For all the foregoing reasons, I have concluded that the Region has used a reasonable method for determining backpay and determining the appropriateness of the other remedies described in the Board Order.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlrb.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on **E-File Documents,** enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **December 27, 2016**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before .** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after , **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

Garey Edward Lindsay
Regional Director

Enclosure: Form NLRB-5434

cc: SHARON K. WILLIE, DIRECTOR HR - MIKE-SELL'S SNACK FOOD COMPANY - PO BOX 115 - 333 LEO ST - DAYTON, OH 45404-0115

JENNIFER R. ASBROCK, ESQ. - FROST, BROWN & TODD, LLC
400 WEST MARKET STREET - SUITE 3200 - LOUISVILLE, KY 40202-3363

INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957
2719 ARMSTRONG LN - DAYTON, OH 45414-4225

JD–55–17
Dayton, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MIKE-SELL'S POTATO CHIP COMPANY

and **Case 09–CA–184215**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES, AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

Linda Finch, Esq.,
for the General Counsel.
Jennifer Asbrock, Esq.,
for the Respondent.
John R. Doll, Esq.,
for the Charging Party.

DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case was tried in Cincinnati, Ohio, from May 31 through June 2, 2017. The complaint, as amended, alleges that Mike-Sell's Potato Chip Company (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by: (1) failing or refusing to bargain with the International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957 (Union) about the decision to sell four company sales routes to independent distributors; (2) failing to bargain with the Union prior to selling two delivery vehicles to independent distributors; and (3) refusing to provide the Union with requested information related to the sale of the company sales routes. Respondent denies the alleged violations, contending its decision to sell the routes was not a mandatory subject of bargaining. And, even if it had been, Respondent argues the Union waived its right to bargain over the decision, which obviates the Union's claimed need for the requested information.

[1] Abbreviations in this decision are as follows: "Tr." for transcript; "Jt. Exhs." for Joint Exhibits; "GC Exh." for General Counsel's Exhibit; "C.P. Exh. " for Charging Party's Exhibit; "R. Exh. " for Respondent's Exhibit; "G.C. Br. _" for General Counsel's brief; "C.P. Br. _" for Charging Party's brief; and "R. Br." for Respondent's brief.

ATTACHMENT
B

Respondent contends the allegation over the vehicle sales has no merit and is untimely under Section 10(b) of the Act. Based upon the evidence and applicable law, I find the decision to sell the four sales routes amounted to subcontracting of unit work, which is a mandatory subject of bargaining. I further find that the Union did not waive its right to bargain, and that the requested information was both relevant and necessary to the Union for its role as bargaining representative. As for the sale of the delivery vehicles, the General Counsel's post-hearing brief does not address this allegation, and, thus, it appears to have been abandoned. In any event, I find the allegation is barred under Section 10(b) of the Act, because the Union had constructive notice of those sales more than 6 months prior to the filing of the amended charge.

II. STATEMENT OF THE CASE

On September 14, 2016, the Union filed an unfair labor practice charge against Respondent, docketed as Case 09–CA–184215, alleging violations of the Act related to the sale of the routes. On December 9, 2016, the Union filed a first-amended charge in Case 09–CA–184215. Based on its investigation, on March 17, 2017, the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint against Respondent alleging that it violated Section 8(a)(5) and (1) of the Act when it failed to bargain with the Union regarding the decision to sell the four routes and when it failed or refused to provide the Union with the requested information. On March 27, 2017, Respondent filed its answer, and, on April 24, 2017, filed its amended answer, denying the alleged violations of the Act.

On May 31, 2017, prior to the start of the hearing, the Union filed a second-amended charge in Case 09–CA–184215, adding an allegation that Respondent violated Section 8(a)(5) and (1) of the Act since September 2016, when it unilaterally changed terms and conditions of employment by entering into contracts to sell owner-operator equipment. At the conclusion of its case-in-chief, the General Counsel orally moved to amend the complaint to include allegations that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally sold two delivery vehicles without bargaining with the Union. At the hearing, Respondent denied the amended allegations, as both untimely and without merit. (Tr. 220–221; 1062–1064.)

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent, Charging Party, and General Counsel filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following[2]

[2] On July 7, 2017, Respondent filed a motion to correct approximately 100 typographical errors in the transcript. After reviewing the transcript, I grant Respondent's unopposed motion.

III. FINDINGS OF FACT[3]

A. Jurisdiction

Respondent is a corporation with an office and place of business in Dayton, Ohio (Respondent's facility), and has been engaged in the manufacture and distribution of snack foods. In conducting its operations during the 12-month period ending March 15, 2017, Respondent has purchased and received goods at its facility valued in excess of $50,000 directly from points outside the State of Ohio. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

B. Collective-Bargaining Relationship

For over thirty years, Respondent has recognized the Union as the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees, within the meanings of Sections 9(a) and (b) of the Act:

> [A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

Respondent's recognition of the Union as the collective-bargaining representative of the above unit has been embodied in a number of successive collective-bargaining agreements, with the most recent agreement being in effect from November 17, 2008 to November 17, 2012.[4]

The following are provisions contained in the parties' most-recent collective-bargaining agreement:

> ARTICLE VIII-B
> ROUTE BIDDING
>
> Section 5 In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to displace a less senior employee. However, displacements shall be restricted to the employees' service location.

---

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

[4] The Union also is the exclusive bargaining representative of Respondent's warehouse employees, which are in separate unit and covered by a separate collective-bargaining agreement.

ARTICLE XIV
OWNER-DRIVER EQUIPMENT

Section 1 The Company agrees that it will not employ or contract for owner-driver equipment, and that the Company shall not rent, lease or sublease equipment to members of the Union or any other individual, firm, cooperation or partnership which has the effect of defeating the terms and provisions of this Agreement.

ARTICLE XIX
MANAGEMENTS RIGHTS

Section 1 Management of the plant and the direction of the working force, including the right to hire, promote, suspend for just cause, disciplining for just cause, discharge for just cause, transfer employees and to establish new job classifications, to relieve employees of duty because of lack of work or economic reasons, or other reasons beyond the control of the company, the right to improve manufacturing methods, operations and conditions and distribution of its products, the right to maintain discipline and efficiency of employees is exclusively reserved to the company. It is understood however, that this authority shall not be used by the company for the purpose of discrimination against any employee because of their membership in the union, and that no provision of this paragraph shall in any way interfere with, abrogate or be in conflict with any rights conferred upon the union or its members by any other clause contained in this agreement, all of which are subject to the grievance procedure.

(Jt. Exh. 1.)

C. Background

1. Respondent's Operations

Respondent is headquartered in Dayton, Ohio, and has two production facilities: one in Dayton, where it manufactures its potato chips, and one in Indianapolis, Indiana, where it manufactures its extruded corn products. Respondent currently has one distribution center, located in Dayton, Ohio.[5] Respondent distributes its snack products to Ohio, Indiana, Illinois, Kentucky, Pennsylvania, and Michigan. (Tr. 232–233.)

Respondent has two distribution methods: direct store delivery and warehouse or direct sales. The direct store delivery method is where a salesperson travels around to retail customers within a geographic territory to take orders and deliver products. The warehouse or direct sales method is where a retailer (e.g., Big Lots) purchases and picks up products from Respondent and then distributes the products out to the retailer's individual stores. (Tr, 233–234.)

[5] Prior to 2012, Respondent had six distribution centers in Ohio (Cincinnati, Columbus, Sabina, Springfield, Greenville, and Dayton).

Direct store delivery is handled by route sales drivers and independent distributors. Route sales drivers are bargaining unit employees represented by the Union. As the title indicates, these drivers are assigned a route and are responsible for servicing the customers (e.g., grocery stores, retail stores, gas stations, restaurants, etc.) on that assigned route. Their duties include reviewing orders, loading their company-owned trucks with product, traveling to customers, stocking customer shelves, rotating unsold product, performing point-of-sale marketing, and removing expired product. The drivers track orders, deliveries, and sales using a company-owned handheld electronic device. Route sales drivers are paid a commission based on the type and amount of product they sell, as well as additional benefits (e.g., health and welfare benefits, pension, leave, etc.) per the collective-bargaining agreement. The routes can vary as far as number of customers, size of orders, geographic proximity, and sales volume. Routes are assigned to drivers through a seniority-based bidding system.

Independent distributors are individuals or entities that enter into agreements with Respondent for the primary right to distribute Respondent's products within a defined geographic territory.[6] Independent distributors perform the same core tasks as route sales drivers as far as servicing the customers, but, unlike the route sales drivers, they assume the costs and liabilities associated with purchasing, storing, transporting, and selling those products. For example, in addition to paying for the products they sell, distributors are responsible for acquiring, maintaining, and insuring their own delivery vehicle(s), storage location(s), and other tools and equipment. Independent distributors are paid a contractually-agreed upon margin based on the type and amount of product they sell, but do not receive any additional pay or benefits. The specific terms of the arrangement between Respondent and distributors are set forth in the individual independent distributor agreements.[7]

---

[6] For the purposes of this case, territory and route are used interchangeably. (R. Br. 3, fn. 4.)

[7] The following are some of the terms and conditions contained in the individual distributor agreements. The agreement affords the independent distributor the nonexclusive right to buy, sell, and distribute Respondent's products in the distributor's territory. The distributor agrees to use its best efforts to sell, promote the sale of, and distribute the products to retailers located within the territory. If there is any dispute as to the territory boundaries, the final decision is made by Respondent as to which distributor is to service the territory in question, without recourse from the distributors involved. Respondent agrees to sell and deliver to the distributor, in the quantities required for the distributor's wholesale business, and the distributor is expected to sell the product line available. The distributor understands and agrees that Respondent may in its sole discretion, at least once annually, adjust upward or downward any distributor margins, as long as the Respondent provides the distributor with 30-days' written notice. The distributor is required to adhere to the delivery and merchandise standards prescribed by its customers and by Respondent, and to submit all invoices to the Respondent, without exception, within the timeframe set forth in the agreement. The distributor agrees to maintain sufficient inventory of products to meet the needs of the retailers in the distributor's territory. The distributor agrees to indemnify and hold Respondent harmless for any and all losses, damages, and expenses in any way connected with conducting the distributor's business. To that end, the distributor agrees to maintain liability insurance at the level set forth within the agreement. The distributor agrees to accept full responsibility for, and to pay, all of the costs and expenses incurred by it, or any agent, employee, or representative authorized to act on the distributor's behalf in conducting its business. Respondent and the distributor agree that their relationship is that of a seller and independent buyer, and the distributor shall remain, while the agreement is in effect, an independent contractor whose own judgment and sole discretion shall control activity and movement, the means and methods of distribution, and all other matters pertaining to its business operations. Respondent has no right to require the distributor to work any specific place or time for any purpose, to devote any particular time or hours to the business, to follow any specified schedule

In the last several years, Respondent has experienced a steady decline in its overall net worth ($18 million in 1999, to $5 million currently). (Tr. 235–236). Phil Kazer, Respondent's Executive Vice President of Sales and Marketing, attributed this decline, in part, to larger competitors, such as Frito-Lay, being better positioned because of their size to market, promote, and aggressively price their products; and to grocery and retail stores, such as Kroger, Meijer, and Walmart, increasingly selling snack products under their own private labels—both reducing the retail space available to Respondent to sell its products. Another reason Kazer cited for the decline in net worth is the annual losses Respondent has experienced in its company route sales division (totaling $9 million in losses from 2006 to 2016). (Tr. 243–244). Kazer opined that by using company route sales drivers Respondent remains responsible for the costs, both labor and nonlabor, including, but not limited to, the storing, transporting, and stocking of product, as well as the cost of any unsold product. (Tr. 245–246.) Kazer testified that by selling routes to independent distributors, Respondent transfers this risk of loss from the company onto them.

Kazer testified that in this current changing environment, Respondent believes its greatest opportunity for growth is to move away from distributing and focus more on manufacturing and branding quality products. To that end, over the last several years, Respondent has been selling company delivery routes to independent distributors. In around 2012, Respondent had approximately 70 company driver routes. Today, it has approximately 12 routes. In around 2012, there were approximately 100 routes owned by independent distributors. Today, there are over 170. (Tr. 246–247.)

2. 2012 Arbitration Award

In October 2011, Respondent informed the Union that it intended to sell a remote sales route in Marion, Ohio to an independent distributor (Buckeye Distributing). Respondent was selling the route because, despite various efforts to make it profitable, it continued to lose approximately $1,100 per week. Respondent informed the Union it intended to sell the route within the next 3 or 4 weeks, and that per Article VIII-B, Section 5 of the parties' collective-bargaining agreement, the affected route sales driver (Angie Watson) would be allowed to use her seniority to bump into another route. The Union filed a grievance over the sale and the matter went to arbitration.[8] The Union argued the sale amounted to unlawful subcontracting of unit work not permitted under the parties' agreement. Respondent countered that it was not subcontracting, but rather a change in the Company's distribution methods to reallocate risk of unprofitable routes. Respondent argued it was permitted under the management-rights clause

---

routes, to confine or extend business to any particular retail customer, to use any specified techniques for soliciting sales or displaying merchandise, to employ or refrain from employing helpers or substitutes, to make reports to the company, to keep records other than those necessary for invoicing, etc. Respondent may, from time to time, in exercise of its sole judgment, increase or reduce the size of, replace or transfer/reassign any retail outlet to any other distributor, or otherwise change the distributor's territory, but Respondent will notify the distributor that it is considering such a revision and consult with the distributor relative to the changes that are being considered. Either party may terminate this agreement, at will, with or without cause, by giving 30 days' written notice to the other party. (Jt. Exh. 12.)

[8] The arbitration decision refers to instances in 2009, 2010, and 2011--during the life of the collective-bargaining agreement--in which Respondent sold routes serviced by unit drivers to independent distributors in which Respondent notified the Union of the decision, and the Union did not object. (Jt. Exh. 1.).

(Art. XIX), and was consistent with prior sales of routes that occurred without the Union's objection. On September 26, 2012, Arbitrator Michael Paolucci issued his decision. He found that this was not a typical subcontracting case, but rather a change in the methodology of how Respondent operated its business—a change that involved the transfer of an entire business unit (the route), including its expenses and potential revenue, to a third party. Arbitrator Paolucci held, in pertinent part:

> Absent clear contract language, it must be found that the management right to control distribution, and determine profitability allows the action of the Company. The language that the Union cites, where the parties contemplated situations where it "becomes necessary to eliminate a route or combined one with another" in Article VIII-B, must be found as supportive of this decision. The "elimination" of a route is fairly interpreted as either being elimination due to the ending or selling of a route. It would not be logical to only make the language applicable to a situation where the Company determines that the lack of profitability only necessitates the complete withdrawal from a market. The elimination provision must be given a broader interpretation and it must apply where the lack of profitability could result in either the complete withdrawal from a market, or the selling of a route thus making the route eliminated from the Company's control. This broader meeting is justified based on the Company's business practices as currently configured. Since it has over 100 distribution partners and only 80 [route sales drivers] then it follows that the parties intended the elimination provision to cover all transfers of the work from the bargaining unit member to a third party, or to the ending of the work, while the other part of the provision covers other situations where the work is merged with another route.
>
> To find otherwise would mean that the parties knew enough to address situations where a route was ended completely when the Company would withdraw from a market; and they knew enough to address situations when routes were merged; but that they lacked enough foresight to understand that routes could be sold and a route could be eliminated in that fashion. This does not follow since the Company has had third-party distributors as part of the business for some time. It is a more reasonable interpretation that they intended the two (2) instances in the provision—i.e., "elimination" or "merger" to cover all expected situations.
>
> Based on the foregoing, it must be found that the language supports the analysis above, and expressly addresses the situation of the Grievant. Her work was eliminated through the sale of the route and she was given the opportunity to bump. Her work was not subcontracted, it was unprofitable and the business was sold to third party. Based on this analysis it must be found that the company did not violate the agreement.

(R Exh. 2, pp. 20–21)

3. Collective-Bargaining Negotiations and Subsequent Route Sales

The parties' collective-bargaining agreement expired on November 17, 2012. On October 10, 2012, the parties met for their first bargaining session over a successor agreement.

At the start of this session, Respondent informed the Union that it intended to sell its 29 sales routes in Columbus, Sabina, and Cincinnati, Ohio, effective November 18, 2012. (Tr. 302–303.) Respondent sold these routes to independent distributor Keystone Distributing, Ltd./ Buckeye Distributing Company because of Respondent's "dire" financial situation. The Union never demanded to bargain over the decision to sell these routes, but it did request to bargain over the effects. (Tr. 305.) The parties met for effects bargaining and later entered into an agreement in which Respondent would provide severance or modified bumping rights to the affected bargaining unit drivers.[9] (Tr. 307.) The Union never filed a grievance or an unfair labor practice charge regarding the sale of these routes.

On November 18, 2012, Respondent unilaterally implemented its last, best, and final offers to the Union, claiming the parties had reached an impasse. The Union filed an unfair labor practice charge regarding the implementation, and a hearing was held before Administrative Law Judge Geoffrey Carter on April 15–17, 2013.

On April 24, 2013, prior to a contract negotiation session, Respondent informed the Union that it intended to sell five company sales routes in Greenville, Ohio to independent distributor Earl Gaudio & Son, Inc., effective June 2013. The Union again did not request to bargain over the decision, but it did request to bargain over the effects. (Tr. 316–318.) The parties later met and the Union sought a similar arrangement to the one the parties reached when Respondent sold its routes in Columbus, Sabina, and Cincinnati. Respondent, however, was unwilling to provide severance or bumping rights to four of the five affected employees because the drivers were, in Respondent's opinion, low performers. But Respondent did agree to pay severance to the fifth affected driver. The Union never filed a grievance or an unfair labor practice charge regarding the sale of these Greenville, Ohio routes. (Tr. 320–321.)

About a month later, Gaudio's parent company filed for bankruptcy. Per the terms independent distributor agreement, the Greenville routes reverted back to Respondent immediately.[10] In July 2013, Respondent resold these Greenville routes to independent distributor Helm Distributing Company. Respondent did not provide the Union with notice that the routes had reverted back, or that they had been resold to Helms Distributing Company. (Tr. 327–331.)

On June 18, 2013, Administrative Law Judge Geoffrey Carter issued his decision finding that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its November 18, 2012 offers to the Union without first bargaining to a good-faith impasse. Administrative Law Judge Carter found the parties were not at impasse at the time of the implementation through March 2013, in part, because the parties continued to meet and the Union continued to make conciliatory offers toward an agreement. See *Mike-Sell's Potato Chip Co.*, JD–40–13.[11]

---

[9] Art. VIII-B, Sec. 5 of the collective-bargaining agreement allowed for employees to bump into other routes within their service location. However, in this case, Respondent had sold all of the routes within the employees' service location, so there were no other routes that they could bump into. As a result, the parties agreed that the affected drivers could bump into routes in other service locations. (Tr. 307.)

[10] There is no evidence introduced regarding who serviced these routes between when they reverted back to Respondent and when they were sold to Helm Distributing. (Tr. 703.)

[11] On June 13, 2013, Respondent unilaterally implemented a revised final offer. (R Exh. 3). There has been no finding, one way or another, whether the parties had reached a good-faith impasse as of the time Respondent implemented its revised final offer in June 2013. The parties agree that the issue of impasse

On July 17, 2013, Respondent provided the Union with written notification that it was selling its (four) Springfield routes to an independent distributor (Helm Distributing Company), effective August 17, 2013. (R. Exh. 8.) (Tr. 338–340.) The Union again did not make a demand to bargain over the decision to sell the routes, but it did request to bargain over the effects. Respondent and the Union did meet, and the parties ultimately agreed to provide severance or bumping rights to the affected bargaining unit drivers. (Tr. 345.) The Union did not file a grievance or an unfair labor practice charge over the sale of the Springfield routes. (Tr. 346.)

At some point in 2014, Buckeye Distributing Company filed for bankruptcy liquidation, and all 29 sales routes it had acquired in Columbus, Sabina, and Cincinnati, Ohio reverted back to Respondent, per the terms of the independent distributor agreement. (Tr. 358.) Prior to Buckeye filing for bankruptcy, Kazer testified that he was in discussions with Snyder Lance, the second largest snack food manufacturer and distributor in the country, about acquiring the routes at issue "because of the job that Buckeye was doing." (Tr. 358–359.) Kazer did not provide any more information as to what he meant by that statement. Respondent eventually transferred the 29 routes to Snyder Lance after Buckeye Distributing Company filed for bankruptcy.[12] There is no evidence Respondent notified the Union that these routes had reverted back, or that they were later transferred to Snyder Lance.

In November or December 2015, Helms Distributing Company also filed for bankruptcy, and the Greenville and Springfield routes Helm Distributing Company had acquired reverted back to Respondent. On December 15, 2015, Respondent resold those routes to an independent distributor, Big TMT Enterprize, LLC.[13] Respondent did not provide the Union with notification that the routes had reverted back, or that they were resold to Big TMT Enterprize.[14]

---

will be addressed in the compliance proceeding related to Respondent's unlawful unilateral implementation of its November 18, 2012 final offer, and, therefore, it was not an issue litigated in this proceeding.

On January 15, 2014, the Board affirmed Administrative Law Judge Carter's decision. See *Mike-Sell's Potato Chip Co.*, 360 NLRB 131 (2014). Respondent appealed the Board's decision to the D.C. Circuit Court of Appeals, and the Board cross-petitioned for enforcement. On December 11, 2015, the Court of Appeals enforced the Board's order. *Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318 (D.C. Cir. 2015). This enforced Board order is the subject of the previously mentioned compliance proceeding.

[12] The former Buckeye Distributing Company employees continued to service the routes between when they revered back to Respondent and when they were sold to Snyder Lance. (Tr. 701.) There is no other evidence in the record regarding the terms or conditions associated with having these individuals continue to service the routes during this period of time.

[13] The former Helm Distributing Company employees continued to service the routes between when they revered back to Respondent and when they were sold to Big TMT Enterprize, LLC. (Tr. 700). There is no other evidence in the record regarding the terms or conditions associated with having these individuals continue to service the routes during this period of time.

[14] Respondent contends that the Union, through its steward Richard Vance, should have been aware that these routes were resold because Big TMT Enterprize temporarily worked out of Respondent's Dayton distribution center where Vance and other bargaining unit employees worked, and Vance and the others likely would have seen Big TMT Enterprize employees loading their trucks. (Tr. 356–357). I find, however, Respondent failed to present sufficient evidence to establish the Union had actual or constructive notice.

The parties met for bargaining over a successor agreement from October 2012 through June 2014. Thereafter, the parties met to discuss a global settlement. Those discussions continued through 2016. From October 2012 through June 2014, the parties met approximately 14 times. In those negotiations, the parties made proposals regarding the language in Art. VIII-B, Section 5, addressing bidding. Respondent sought to modify the language to: "In the event that it becomes necessary to terminate or sell a route or combine one with another, the displaced employee or employees who lose their routes due to this combination or elimination may use their seniority to bump any less senior employee within their currently assigned location." (R. Exh. 3, p. 9.) The Union sought to maintain the existing language. Respondent eventually agreed to maintain the existing language because the Union stated no change was needed. (Tr. 273–275.) In November 2016, as part of the global settlement discussions, the Union proposed inserting into the management-rights clause the following language: "Notwithstanding anything contained in this Agreement to the contrary, the Company shall not sell, transfer, or otherwise assign any current routes, in one transaction or series of transactions, to any other person or entity without the agreement of the Union." (R. Exh. 4.)

D. Alleged Unfair Labor Practices

1. April 27, 2016 Notification about Possible Sales and Resulting Grievance

On April 27, 2016, Respondent sent the Union a letter stating that in accordance with Respondent's "rights" as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent was seriously considering the elimination of three Dayton, Ohio sales routes by selling them to independent distributors. (Jt. Exh. 3.) The letter stated that, although the specific routes ultimately eliminated will depend on the terms negotiated with the independent distributor(s), it is possible that any of the current routes may be affected, and that a final decision would be made within 3–6 months. Respondent noted that if it ultimately decided to sell one or more of these routes to independent distributors, it would provide the Union with timely notice of its decision, bargain over the effects of the route elimination(s), and that affected drivers would have seniority-based bumping rights. That same date, Respondent sent all employees a letter informing them of its plan to sell Dayton sales routes to independent distributors, and if employees were interested in becoming a distributor, they should contact the Company. (Jt. Exh. 2.) On May 6, 2016, the Union, through steward Richard Vance, filed a grievance over Respondent's announced intent to sell these three routes. (Jt. Exh. 4.) The grievance went through the various steps, and Respondent denied violating any provisions of the parties' expired agreement.

The parties had a third-step grievance meeting in June 2016. At this meeting, the Union expressed frustration that Respondent sent a letter to employees soliciting them to become distributors. (Tr. 374.) The Union also requested that Respondent not select the more senior routes to sell. Respondent informed the Union that all routes were under consideration. (Tr. 375.) Respondent stated that it had the prerogative to sell the routes under the Paolucci decision. (Tr. 151–152.) The Union did not demand to bargain over the sale of the routes because no routes had been selected at that time. (Tr. 375.)

2. Notification Regarding the Sale of Route 102

On July 11, 2016, Respondent sent the Union a letter stating that, in accordance with its "rights" as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent will be selling Route 102, Xenia territory, effective July 24, 2016. (Jt. Exh. 5.) The unit driver assigned to the route had announced his retirement. The Union did not file a new grievance after receiving this notification. Vance testified he believed that his May 6, 2016 grievance covered this particular sale. The Union never demanded to bargain over this sale or its effects. The route was eventually sold to Big TMT Enterprize, LLC. (Tr. 375.)

3. Notification Regarding the Sales of Routes 104 and 122

On August 29, 2016, Respondent sent the Union a letter stating that in accordance with its "rights" as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent will be eliminating two positions through the sale of Route 104 and Route 122, effective September 4, 2016. (Jt. Exh. 6.) Respondent noted that the affected drivers (Gerald Shimmer #122 and Jerry Lake #104) would have an opportunity to rebid on September 1, 2016. On September 29, 2016, the Union, through steward Richard Vance, filed a grievance regarding the sale of these two routes. The parties met on this grievance at the various steps, and Respondent again denied committing any violations of the parties expired agreement.

On around August 30, 2016, Gerald Shimmer, one of the affected drivers, informed Vance that he was told that his delivery vehicle was being sold, and that he (Shimmer) needed to unload his truck and use a spare vehicle for the last few days of his route. (Tr. 114–115.)

The two routes were eventually sold to BLM Distributing, LLC. (Tr. 382.) The owner of BLM Distributing is Lisa Krupp. Krupp is a former unit driver that provided relief coverage when the other unit drivers were on vacation or leave.

4. Union's Demand to Bargain and Information Request

In addition to the grievance, on August 31, 2016, the Union, through Business Representative Alan Weeks, sent Respondent a letter disputing Respondent's claim that the Paolucci arbitration decision gave it the right to sell Routes 104 and 122. (Jt. Exh. 8.) Specifically, the Union argued that Arbitrator Paolucci found no obligation to bargain because of the demonstrated unprofitability of the Watson route, the fact that the Watson route was far away from the Columbus, Ohio distribution center increasing the cost of providing product to the route, and the fact that similar unprofitable routes have been sold in the past. In contrast, the Union argued that no information has been provided to the Union showing that Routes 104 and 122 were unprofitable; the two routes at issue are within the Dayton, Ohio area and providing product did not cost more than providing product to any other route out of the Dayton distribution center; and Respondent has not previously sold a route within the Dayton service area. Based on these factors, the Union demanded Respondent meet and bargain over the decision to sell Routes 104 and 122. In order to be prepared for such bargaining, the Union requested the following information:

1. All documents that demonstrate the profitability of all of the Company's routes for the period from September 1, 2014 through August 1, 2016 so

comparison can be made as to the profitability of all the routes on Route No. 104 and Route No. 122.

2. A copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold.
3. A description of how Mike-Sell's product is to be received by the entity to whom [R]oute No. 104 and Route No. 122 is scheduled to be sold.
4. A copy of all correspondence, including electronic correspondence, between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016.

The Union concluded the letter by requesting that Respondent delay the sale of the two routes until the Union had an opportunity to review the requested information and the parties met for bargaining. (Jt. Exh. 8.)

On September 12, 2016, Respondent sent a reply to the Union's August 31, 2016 letter. (Jt. Exh. 9.) In its reply letter, Respondent disagreed with the Union's interpretation of the Paolucci arbitration decision, arguing that the Union was reading the decision too narrowly, particularly that it only applied to the sale of unprofitable routes. Respondent noted that the Arbitrator "specifically rejected the Union's argument 'that the Company did this simply because the costs were too high,' finding instead that '[w]here an entire business unit is transferred, the factors justifying the change are much more numerous than a simple measure of cost savings.'" In short, Respondent argued that the Arbitrator "recognized that [t]he Company has chosen a different manner of operating its business, and [a]bsent clear contract language, it must be found that the management right to control distribution, and determine profitability, allows the [Company to sell its routes to independent distributors without bargaining with the Union.]" (internal quotations omitted). Respondent went on to say that it exercised its "inherent management right" to determine methods of distribution by selling Routes 104 and 122, just as it did by selling Route 102 in July 2016. The last paragraph of Respondent's letter states:

> Because Arbitrator Paolucci's award makes it clear that Mike-Sells has the management right to change distribution methods in accordance with strategic objectives, we respectfully decline to bargain over our decision to sell Company routes; to delay the sale of Routes 104 and 102 pending such decisional bargaining; or to respond to information request designated specifically for the purpose of engaging in such decisional bargaining.

In a footnote, Respondent stated it remained willing to bargain over the effects of the route eliminations, if any, and remained willing to provide relevant information for that purpose. But because the arbitration award confirmed that Respondent had the managerial discretion to unilaterally sell company routes, it is not a mandatory subject of bargaining; therefore, Respondent did not believe that the Union's August 31 information request (which was made for the purpose of decisional bargaining) was presumptively relevant or necessary for the Union to perform its statutory duties. Respondent did not provide the Union with the information it requested. (Tr. 475.)

5. Notification of Sale of Route 131 and Resulting Grievance

Also, on September 12, 2016, Respondent sent the Union a separate letter stating that in accordance with its "rights" as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent will be selling Route 131, effective September 17, 2016. (Jt. Exh. 10.) On that same date, the Union, through steward Richard Vance, filed a grievance regarding the sale of Route 131. The route was eventually sold to Big TMT Enterprize, LLC. The parties later met on these and other grievances in January 2017, and Respondent denied any violations of the parties' expired collective-bargaining agreement.[15]

6. Sale of Delivery Vehicles to Independent Distributors

On September 4, 2016, Respondent sold a delivery truck to independent distributor Lisa Krupp's company BLM Distributing LLC. On September 11, 2016, Respondent sold a delivery truck to independent distributor Charles Morris's company Big TMT Enterprize, LLC. (Tr. 222.) There was no grievance filed regarding the sale of the vehicles.

7. Costs and Revenue Associated with Sales

At the hearing, Kazer estimated that Respondent recognized approximately $229,000 in total savings in labor costs from selling the routes (i.e., $152,000 in commissions, $35,000 in pension contributions, $14,000 in vacation pay, holiday pay and sick day pay, $13,000 in employment taxes, $7,000 in healthcare costs, $6,000 in workers' compensation payments, and $1,100 in supplemental life insurance payments). He estimated approximately $195,000 worth of nonlabor savings, including the elimination two nonunion positions; the costs associated with maintaining and insuring the four vehicles that were sold; costs of stale products; etc. Kazer also identified several intangible cost savings. He also identified Respondent received $74,000 from selling the routes and $34,000 from selling the trucks to the independent distributors, and $18,000 in inventory liquidation. However, Kazer noted that the sale of the four routes meant paying the independent distributors $324,000 in distributor margins. (Tr. 538–542.)

IV. CONTENTIONS OF THE PARTIES

The General Counsel contends that Respondent's decisions to sell the four company routes at issue to independent distributors amounts to subcontracting of bargaining unit work, which is a mandatory subject of bargaining, and Respondent's failure or refusal to bargain with the Union over those decisions violated Section 8(a)(5) and (1) of the Act. The General Counsel also contends that the information the Union requested from Respondent on August 31, 2016, was relevant and necessary for the Union's role as collective-bargaining representative, and that Respondent's failure or refusal to provide that requested information violated Section 8(a)(5) and (1) of the Act.

[15] Respondent participates in the Union's Central States Pension Fund. As a participant in this Fund, Respondent is subject to a withdrawal liability of $20 million if the number of contribution based units (CBUs) drops below a certain amount. Kazer testified that Respondent has not sold more routes out of concern that further sales would trigger the withdrawal liability. (Tr. 579.)

Respondent denies the alleged violations. Respondent contends selling the company sales routes was not a mandatory subject of bargaining because it was part of Respondent's decision to fundamentally change its business model by discontinuing these discrete business units. Moreover, even if the sales were a mandatory subject of bargaining, Respondent contends that the Union waived its right to bargain. And because there was obligation to bargain over the sales, Respondent argues it had no obligation to provide the Union with the requested information.

V. LEGAL ANALYSIS

A. Decisions to Sell the Routes Were Mandatory Subjects of Bargaining.

Section 8(d) of the Act imposes an obligation on an employer to bargain with respect to wages, hours, and other terms and conditions of employment. Section 8(a)(5) makes it an unfair labor practice for an employer to make unilateral changes to these mandatory subjects without first providing the union with notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The issue, therefore, is whether Respondent's decision to sell the four company routes at issue amounted to a mandatory subject of bargaining.

In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964), the Supreme Court found that an employer's subcontracting of maintenance work to a third party was a mandatory subject of bargaining, holding that:

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

379 U.S. at 213–214.

In *First National Maintenance Corp. v, NLRB*, 452 U.S. 666 (1981), the Supreme Court held that not all decisions that result in the displacement of employees require bargaining. In that case, the employer provided maintenance and housekeeping services for commercial establishments, including a nursing home. Under the service contract, the home reimbursed the employer for its labor costs and paid a fixed management fee. The employer terminated its contract with the home over a dispute about the management fee, which led it to discharge its employees working there without bargaining with the union. In deciding the matter, the Court divided management decisions into three categories for bargaining purposes. First, "[s]ome management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship" and are thus not mandatory subjects of bargaining. Second, "[o]ther management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively 'an aspect of the relationship' between employer and employee" and are thus mandatory subjects. 452 U.S. at 677. Third, a decision that had a direct impact on employment because it involves the elimination of jobs, but which had as its focus only the economic profitability of the contract, a matter wholly apart from the employment relationship. The Court stated that the employer's decision to terminate its contract with the home involved a

change in the scope and direction of the enterprise and was akin to a decision whether to be in business at all, "not in [itself] primarily about conditions of employment." 452 U.S. at 677, quoting from *Fibreboard*, 379 U.S. 203, at 223 (1964) (Stewart, J. concurring). In determining whether there is a bargaining obligation in this third category, the Court set forth the following test:

> [I]n view of an employer's need for unencumbered decision making, bargaining over management's decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

First National Maintenance, 452 U.S. at 678–679.

The Court noted that the employer had no intention of replacing the discharged employees or to moving the operation elsewhere, that the sole purpose for the closing was to reduce economic loss, and that the employer's decision was based on a factor over which the union had no control or authority. As such, the employer's only obligation was to bargain over the effects of the decision. The Court, however, was careful to clarify that its holding was limited to the particular situation presented and was not intended to cover other types of management decisions, such as "plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." Id. at 686 fn. 22.

In *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1370 (1982), the dispute was over whether a change should be characterized as a mandatory subcontracting decision under *Fibreboard*, or as a non-mandatory partial closing under *First National Maintenance*. In that case, the employer operated a commissary where it prepared and distributed food products to a restaurant chain. Without bargaining with the union, the employer decided to discontinue its shrimp processing operation and subcontract that work to a third party, which resulted in the termination of 12 employees. The Board, in a 3-2 decision, held:

> The distinction between subcontracting and partial closing, however, is not always readily apparent. Thus, it is incumbent on the Board to review the particular facts presented in each case to determine whether the employer's action involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues "particularly suitable for resolution within the collective bargaining framework." If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operations," or a decision lying at "the very core of entrepreneurial control," the decision will not fall within the scope of the employer's mandatory bargaining obligation. A determination of the suitability to collective bargaining, of course, requires a case-by-case analysis of such factors as the nature of the employer's business before and after the action taken, the extent of capital expenditures, the bases for the action, and, in general, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives.

Id. at 1370 (internal citations omitted).

The Board concluded the employer subcontracted the work of shrimp processing, rather than partially closed its food preparation business, because there was no major shift in the direction of employer's business. The Board found that, both before and after the subcontract, the employer engaged in the business of providing prepared foodstuffs to its various stores, and it appeared to continue supplying processed shrimp to its constituent restaurants. The only difference is that the processing work was performed by the third-party's employees pursuant to the subcontract rather than by employer's employees. Accordingly, the Board held that the nature and direction of the employer's business was not substantially altered by the subcontract.

The Board also observed that the closure did not constitute a major capital modification. Although the corporation did sell $30,000 worth of equipment to the third party, this was not so substantial a change as to remove the decision from mandatory bargaining. Finally, the Board held that since escalating costs and proper size grading of the shrimp were the primary reasons for the employer's decision to subcontract, the employer's concerns were of the type traditionally suitable for the collective bargaining process. Thus, the Board found its decision was consistent with *First National Maintenance* as well as *Fibreboard*.

In *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. in relevant part 1 F.3d 24, 31–33 (D.C. Cir. 1993), the Board set forth the test it would use to apply the Court's *First National Maintenance* decision for determining whether a work relocation decision is a mandatory subject of bargaining. Under this test, the General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." The employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses. Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision. The Employer may also avoid bargaining if it can show that (1) labor costs were not a factor or (2) even if labor costs were a factor, the union, could not have offered sufficient labor cost concessions to alter its work relocation decision. Id. at 391. Although *Dubuque* concerned work relocation decisions, the test is applicable to decisions that have a direct impact on employment, but, have as their focus the economic profitability of the employing enterprise.

In *Torrington Industries*, 307 NLRB 809 (1992), the employer unilaterally replaced two union truck drivers with non-bargaining unit drivers and independent contractors, but claimed that its decision was entrepreneurial and did not turn on labor costs. The Board concluded that the *Dubuque Packing* test did not apply because the employer's reasons had nothing to do with a change in the scope and direction of its business. Instead, the Board concluded that the case involved subcontracting decisions similar to those in *Fibreboard*, and, therefore, were mandatory subjects of bargaining, even though the decision was not motivated by labor costs.

In *O.G.S. Technologies, Inc.*, 356 NLRB 642, 645 (2011), a successor employer unilaterally subcontracted die-cutting work, resulting in the replacement of its own die engineers by outside firms. The Board applied *Torrington* and concluded the employer's termination of a portion of its operation constituted subcontracting that required decisional and effects bargaining, holding:

> In contrast to *First National Maintenance*, OGS made certain operational changes, but they did not amount to a 'partial closing' or other 'change in the scope and direction of the enterprise,' which remained devoted to the manufacture and sale of brass buttons to the same range of customers. Before and after the decision to subcontract die cutting, OGS produced and supplied brass buttons to customers. . . . The decision at issue simply resulted in a marginal increase in the percentage of cutting work the [r]espondent subcontracted and a modest change in the functions performed in-house, but not the abandonment of a line of business or even the contraction of the existing business.

Id.

In *Mi Pueblo Foods*, 360 NLRB 1097 (2014), the employer operated a chain of grocery stores and a distribution center. The distribution center employees would load food shipments and grocery items onto trucks, and then unit drivers would deliver them to the employer's stores. The employer used a third-party trucking company to deliver products from certain suppliers to the distribution center, where the products would be unloaded and reloaded onto the employer's trucks for the unit drivers to deliver to the stores. Later, in an effort to increase productivity and efficiency, the employer began having the third-party trucking company deliver the supplies directly to certain stores, bypassing the distribution center and the unit drivers. The union representing the drivers filed a charge alleging the employer had an obligation to bargain over the subcontracting of this work. The Board held that the employer had an obligation to bargain over the decision and the effects of changing from a hub-and-spoke delivery model to a point-to-point model even though that change "did not result in layoffs or significantly affect wages and hours." The Board held that whenever bargaining unit work is assigned to outside contractors, the unit is adversely affected, and there is an obligation to bargain, because absent an obligation to bargain, an employer "could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the [u]nion's bargaining strength." 360 NLRB at 1099.

In light of the foregoing, the core question is whether the scope and direction of Respondent's business was substantially altered when it sold the four company sales routes at issue to the independent distributors. I find it was not. Respondent has been, and continues to be, a manufacturer *and* distributor of snack foods. It has two distribution methods: direct store delivery and warehouse or direct sales. The direct store delivery method is effectuated by the use of company route sales drivers and independent distributors. Although the percentage of routes covered route sales drivers versus independent distributors has changed over the years, Respondent continues to use both to distribute its products to its customers. As for the four routes at issue, Respondent continues to distribute products to those customers. The only difference is that independent distributors are delivering the products on those routes rather than the company route sales drivers.

Under *Fibreboard*, the issue is whether the employer is replacing existing employees with those of an independent contractor to do the same work under similar conditions. In this case, that is what Respondent has done. Respondent contends that, unlike company route sales drivers, independent distributors make significant investment in purchasing their territory, acquiring, maintaining, and insuring storage space, vehicles, equipment, and purchasing product; and these independent distributors assume sizable risk that they will be able to sell the products they buy and have a profitable business. However, at its core, both groups are

responsible for delivering Respondent's products to its customers. Both groups acquire or are assigned a route or territory. Both of the groups review orders, load the products onto their vehicles, travel to customer locations, stock customer shelves, rotate unsold product, perform point-of-sale marketing, and removing expired product. Both use handheld electronic devices to track orders, deliveries, and sales. And both are primarily paid based on what they sell.[16] There clearly are differences between the two, but *Fibreboard* refers to *similar* conditions, not identical ones. And despite the differences, I find that the independent distributors perform the same core work under similar conditions as the route sales drivers. As a result, based on established precedent, I find the sales of these four company routes in 2016 are akin to subcontracting, and, therefore, are mandatory subjects of bargaining.

Respondent contends it has no obligation to bargain because while labor costs were a factor in deciding to sell the routes, it actually costs Respondent more to use independent distributors because their margins. But because I conclude that there was no actual change in Respondent's operations, and labor costs played a role in Respondent's decision to sell the routes, Respondent had an obligation to bargain over the decision to sell the four routes at issue.

Respondent cites to *West Virginia Baking Co.*, 299 NLRB 306 (1990), enfd. 946 F.2d 1563 (D.C. Cir. 1991), for support that it did not have an obligation to bargain over its decision to sell the company routes. In that case, the administrative law judge dismissed the complaint, including the allegations the employer violated Section 8(a)(5) and (1) of the Act when it unilaterally converted all its bargaining unit driver-salesmen to independent distributors after bargaining to an impasse with the union. The judge found that the decision to convert all the unit drivers to independent distributors was not a mandatory subject of bargaining. On appeal, the Board held:

> We agree with the judge's conclusion that the Respondent did not refuse to bargain in good faith over the decision to convert its driver-salesmen to independent distributors and the effects of that decision *and, in fact, did bargain in good faith over the decision and its effects until impasse and lawful implementation of the distributorship program.* Accordingly, we find it unnecessary to pass on whether the Respondent's decision to convert its driver-salesmen to independent distributors is a mandatory or permissive subject of bargaining.

299 NLRB at 306 fn. 3 (italics added).

I find this case to be inapposite. To begin with, the employer sought to completely eliminate all of its driver-salesmen and convert them to independent distributors. It then met and bargained with the union over its decision and its effects. After the parties reached an impasse, the employer implemented the change. As stated above, the Board chose not to address whether the employer's conversion decision was a mandatory subject of bargaining.

---

[16] Under the parties' agreement, route sales drivers are paid a flat rate for route riding and pull up (stocking) work. Otherwise, they are paid a commission. (Jt. Exh. 1, pg. 7.)

Respondent also cites to *NLRB v. Adams Dairy*, 350 F.2d 108 (8th Cir. 1965), cert. denied 382 U.S. 1011 (1965), for support. In that case, the Court of Appeals denied enforcement of the Board's decision in *Adams Dairy*, 137 NLRB 815 (1962), in which the administrative law judge and the Board concluded that the employer violated Section 8(a)(5) and (1) of the Act when it had independent distributors take over the driver-salesmen routes, without giving the Union prior notice or an opportunity to bargain. I am bound by Board law and cannot rely upon the reasoning of the Court of Appeals for not enforcing the Board's order. Even were that not true, I find the case to be inapposite because the employer completely eliminated all driver-salesmen routes and sold all of its trucks. In the present case, Respondent continues to employ company route sales drivers and possess trucks, and, based on Kazer's testimony, it likely will continue to employ route sales drivers out of concern that to do otherwise would trigger significant pension withdrawal liability. (Tr. 581-582).

B. The Union Did Not Waive its Right to Bargain Over the Decision to Sell Routes 102 or 131 by Failing to Request Bargaining.

An employer violates Section 8(a)(5) when it unilaterally institutes changes in mandatory terms of employment without bargaining in good faith. *NLRB v. Katz*, 369 U.S. at 743. In general, good-faith bargaining requires timely notice and a meaningful opportunity to bargain regarding a proposed change. See *Wackenhut Corp.*, 345 NLRB 850, 868 (2005); *Brimar Corp.*, 334 NLRB 1035, 1035 (2010). Once notice is received, the union must act with "due diligence" to request bargaining, or risk a finding that it has waived its bargaining right. See *KGTV*, 355 NLRB 1283 (2010). A union may be excused from requesting to bargain if the employer's notice provides too little time for negotiation before implementation, or if the employer otherwise has made it clear that it has no intention of bargaining about the issue. In these circumstances, a bargaining request would be futile, because the employer's notice informs the union of nothing more than a fait accompli. In order to determine whether the employer has presented the union with a fait accompli, the Board considers objective evidence regarding the presentation of the proposed change and the employer's decision-making process. Id. (union's "subjective impression of its bargaining partner's intention is insufficient" to establish fait accompli). While presenting a proposed change as a fully formulated plan or the use of positive language does not definitively establish a fait accompli, statements conveying an irrevocable decision constitute significant evidence that bargaining would be futile. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004) (employer presented fait accompli by telling union that layoff was a ""done deal"); *Pontiac Osteopathic Hospital*, 336 NLRB at 1023–1024 (notice stating that changes "will be implemented" and other "unequivocal language" evidence of fait accompli). The Board also evaluates the timing of the employer's statements vis-a-vis the actual implementation of the change, the manner in which the change is presented, and other evidence pertinent to the existence of a "fixed intent" to make the change at issue which obviates the possibility of meaningful bargaining. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) *Northwest Airport Inn*, 359 NLRB 690, 693 (2013) (fait accompli established given owner's testimony that a decision to subcontract bargaining unit work had already been made and implemented, and union bargaining proposals regarding employee compensation "made no difference").

As previously stated, on April 27, 2016, Respondent sent the Union a letter stating that, in accordance with Respondent's rights as recognized by Arbitrator Paolucci in his decision in the Watson matter, Respondent was seriously considering the elimination of three Dayton, Ohio sales routes by selling them to independent distributors. The letter stated that *a final decision*

would be made within 3–6 months. Respondent noted that if it ultimately decided to sell one or more of these routes to independent distributors, it would provide the Union with timely notice of its decision, bargain over the effects of the route elimination(s), and that affected drivers would have seniority-based bumping rights. At the June 2016 third-step grievance meeting over the Union's May 2016 grievance, Respondent informed the Union that it had the right to make the sales under the Paolucci decision. On July 11, 2016, Respondent sent the Union a letter stating that it will be selling Route 102, Xenia territory, effective July 24, 2016. There is no dispute the Union took no action after it received Respondent's July 11 letter notifying it of the sale of Route 102. Respondent contends that the Union's failure to request bargaining over the sale of the route amounts to a waiver of it right to bargain. The General Counsel counters, arguing that the Union had no obligation to request bargaining because Respondent announced the sale of Route 102 as a fait accompli.

I find the combination of Respondent's April 27 and on July 11 letters amounted to a notice of a fait accompli. Respondent's April 27 letter to the Union stated that in accordance with its rights, it would make a "final decision" within 3–6 months, and Respondent would notify the Union of that decision and "bargain over the effects of the route elimination(s)." *Sutter Health Central Valley Region*, 362 NLRB No. 199, slip op. at 3 (2015)(fait accompli when the announcement or notification is presented as a "final decision"). As promised, on July 11, Respondent notified the Union of its final decision to sell Route 102, which would be effective on July 24, 2016. The only reasonable reading of these letters is that Respondent had no intention of bargaining with the Union regarding the decision to sell these routes; only that it would be willing to bargain over the effects. This conclusion is further supported by Respondent's September 12, 2016 response to the Union's August 31, 2016 request to bargain over the decisions to sell Routes 104 and 122, when Respondent stated that, per the Arbitration decision, it had no obligation to bargain with the Union over the sale of these routes. Consequently, under these circumstances, I find that the Union's failure to request bargaining over the sale of Route 102 does not constitute a waiver of its right to bargain.

Similarly, I find the Union did not waive its right to bargain over the sale of Route 131 by failing to make a request to bargain after receiving notice of that decision to sell. Respondent provided the Union with notice of that sale the same day it provided its reasoning as to why it did not have an obligation to bargain over the sale of Routes 104 and 122. Based on that information, I find Respondent announced the sale of Route 131 as a fait accompli because it had a fixed intent and was not willing to bargain over the decision.

C. The Union Did Not "Clearly and Unmistakably" Waive Its Right to Bargain Over the 2016 Decision to Sell of the Four Company Routes.

Respondent contends that the Union has waived its right to bargain over the sale of company routes. An employer may escape liability for a unilateral change if it proves that a union has expressed or implied a "clear and unmistakable waiver" of its right to bargain. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007). A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a term and condition of employment and cedes full discretion to the employer on such a matter. However, the Board narrowly construes waivers and has been hesitant to imply waivers not explicitly mentioned in the parties' collective-bargaining agreements. *Mississippi Power Co.*, 332 NLRB 530 (2000), enfd. in part 284 F.3d 605 (5th Cir. 2002) (rejecting employer's waiver argument that the unions incorporated the

benefit plans' reservation of rights clauses into the contract based on a "course of conduct" of copies of the benefit plans provided to the unions and incorporated into the collective-bargaining agreements). A clear and unmistakable waiver can be gleaned from the parties' past practice, bargaining history, prior action or inaction. *American Diamond Tool*, 306 NLRB 570 (1992). However, Board precedent makes clear that a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time. *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993). The burden is on the party asserting the waiver to establish the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

Respondent initially contends that it had no obligation to bargain because it had an inherent right, separate from the expired agreement, to make these decisions to sell routes. I have already addressed and rejected that argument. Respondent also indirectly relies upon the language of the parties' expired collective-bargaining agreement, and the arbitration decision in the Watson matter, as supporting its waiver argument.[17] As previously stated, the parties' agreement does not address the subcontracting of bargaining unit work. Arbitrator Paolucci acknowledged this in his decision. He concluded that the sale of the company route was permitted under the management-rights clause, which allowed Respondent the discretion to control distribution methods. However, the Board consistently has held that a waiver of bargaining rights under a management-rights clause does not survive the expiration of a contract. *Buck Creek Coal*, 310 NLRB 1240 (1993); *Control Services*, 303 NLRB 481 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992), enfd. 961 F.2d 1568 (3d Cir. 1992); *Kendall College of Art*, 288 NLRB 1205, 1212 (1988).

Regardless, a waiver of a statutory bargaining right must be "clear and unmistakable" and will not be inferred from general contract language. *Provena St. Joseph Medical Center*, supra; *Control Services*, supra. The contract language falls well short of this standard. It makes no reference to the period beyond the contract's expiration, and fails to unequivocally and specifically express an intention to permit the Respondent to continue implementing unilateral changes of this sort after contract expiration. *The American Red Cross, Great Lakes Blood Services Region and Mid-Michigan Chapter*, 364 NLRB No. 98, slip op. at 4 (2016).

Respondent further argues that the Union waived its right to bargain by the past practice that has developed as a result of the Union's failure to object to or demand bargaining over the sales of company routes to independent distributors prior to 2016. To establish a past practice of subcontracting justifying a refusal to bargain, an employer must show that the previous subcontracting was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. A history of subcontracting on a random, intermittent, or discretionary basis is insufficient. *Hospital San Cristobal*, 358 NLRB 769, 772 (2012), reaffd. 363 NLRB No. 164 (2016); *Ampersand Publishing, LLC*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB No. 26

[17] At the hearing Respondent cited to its June 2013 revised final offer and its modified language addressing bidding rights. Respondent argued that, under either the prior language or revised language, the Union waived its right to bargain over the sale of company routes. However, in its communications with the Union announcing these sales, Respondent never cited to or relied upon the modified bidding language in its June 2013 revised final offer to support its unilateral action. Respondent, instead, repeatedly relied solely upon Arbitrator Paolucci's decision—and the language that existed then--to support its action.

(2015); and *Sociedad Espanola de Auilio Mutuo y Beneficiencia de P.R.*, 342 NLRB 458, 468–469 (2004), enfd. 414 F.3d 158, 165–167 (1st Cir. 2005). See also *E. I. du Pont de Nemours*, 364 NLRB No. 113 (2016).

In *E. I. du Pont de Nemours*, 364 NLRB No. 113 (2016), the Board, upon remand from the D.C. Circuit Court of Appeals, reexamined whether the employer violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms of the employees' benefit plan at its facilities post contract expiration at a time when the parties were negotiating for successor agreements and were not at impasse. The Board, pursuant to the Court's remand instructions, returned to the rule it followed in its earlier decisions, including *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003), and *Register-Guard*, 339 NLRB 353 (2003), that discretionary unilateral changes ostensibly made pursuant to a past practice developed under an expired management-rights clause are unlawful. The majority overruled precedent, including the Board's decisions in the *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004), *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006), to the extent that those Board decisions conflicted with well-settled waiver principles, and were inconsistent with the Act's goal to encourage the practice of collective bargaining.

Applying the status quo doctrine under *NLRB v. Katz*, supra, the Board held that during negotiations for a successor agreement, the employer has a statutory duty to maintain the status quo by continuing in effect the employment terms and conditions that existed at the expiration of the parties' agreement. Id. slip op. at 4. But because the essence of a management-rights clause is the union's consensual surrender of its statutory right to bargain during the term of the contract, that waiver, like any waiver of a statutory right, does not survive contract expiration, absent evidence of the parties' contrary intent. Thus, the status quo doctrine under *Katz* does not privilege the employer to continue making unilateral changes that, during the term of the agreement, would have been authorized by the now-expired management-rights clause. Id., slip op. at 5. And, because unilateral changes implemented during the term of a contract under the authority of a management-rights clause are based on a union's bargaining waiver, the right granted to an employer to make changes to employees' terms of employment under that clause does not create a past practice permitting an employer to continue to unilaterally implement changes post contract expiration. Id., slip op. at 5–6.

Having overruled the *Courier-Journal* decisions and *Capitol Ford*, the majority found that the employer's wide ranging and varied changes to the benefits of unit employees, made with no cognizable fixed criteria, did not establish a past practice that the employer was permitted to continue when the applicable collective-bargaining agreements had expired. Therefore, the majority held that following the expiration of the parties' collective-bargaining agreements, the employer had the statutory obligation to adhere to the terms and conditions of employment that existed on the expiration date until it bargained to agreement or reached a good-faith impasse in overall bargaining for a new agreement.

Applying these principles to the instant case, I find that Respondent cannot rely upon its prior, unilateral decisions to sell company routes to independent distributors, both before and after the expiration of the parties' agreement, as establishing a waiver of the Union's right to request bargaining over the sale of the four company routes at issue. As established in all the letters Respondent sent to the Union announcing its intent to sell the routes, as well as its response to the Union's August 2016 demand to bargain, Respondent relied upon Arbitrator

Paolucci's decision, which found Respondent had the right sell company routes based on the language of the now expired management-rights clause.[18]

Relying on Arbitrator Paolucci's decision, Respondent argues that Article VIII-B, Section 5, which sets forth employees' bidding rights when a route is eliminated or merged, supports finding a waiver. Arbitrator Paolucci held the "elimination provision must be given a broader interpretation and it must apply where the lack of profitability could result in either the complete withdrawal from a market, or the selling of a route thus making the route eliminated from the Company's control." To begin with, I am not bound by an arbitrator's decision. *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1081 (1955). And, in this case, I do not agree with the Arbitrator's interpretation or reasoning. Article VIII-B, Section 5 does not give Respondent the right to unilaterally sell routes, and it does not constitute a clear and unmistakable waiver of the Union's right to bargain. The provision addresses bidding rights in the event routes are eliminated or merged. However, when Respondent sells a route to an independent distributor, it is not eliminated—it continues to exist. It merely is being serviced by an independent distributor, as opposed to a unit driver.

Moreover, Respondent argues these sales to independent distributors involve the transfer of a discrete business unit. But, according to the independent distributor agreement, Respondent is transferring a primary, not exclusive, right to distribute its products within a defined territory, and the distributor has certain rights and obligations regarding servicing of that territory. And, if the distributor is unable to service that route, it reverts back to Respondent. This occurred on three separate occasions following the expiration of the parties' collective-bargaining agreement, when the independent distributors went bankrupt.[19]

The result is there is no provision, other than the management-rights clause, that arguably gives Respondent the authority to subcontract work by selling routes. Absent some other contractual provision waiving the Union's right to bargain over the subcontracting of unit work through the sale of the route to an independent distributor, the default, or the status quo, is the statutory obligation to bargain over those decisions.

---

[18] Respondent argues that Arbitrator Paolucci recognized that Respondent had an "inherent management right" to sell company routes. I reject that argument. The Arbitrator stated that "[a]bsent clear contract language, it must be found that the management right to control distribution, and determine profitability allows the action of the Company." The management-rights provision of the expired agreement states that the "right to improve manufacturing methods, operations and conditions and distribution of its products . . . is exclusively reserved to the company." I find that Arbitrator Paolucci was relying upon this language as giving Respondent the right to sell the route in that case, and he was not concluding that there was some extra-contractual right. See generally *Weavexx, LLC*, 364 NLRB No. 141, slip op. 3 (2016); and *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, enfd. 722 F.2d 1120, 1126 (1983) ("The arbitrator's conclusion that an extra-contractual residual rights theory authorizes management to make unilateral decisions on mandatory subjects of collective bargaining not specifically covered in a collective bargaining agreement disregards clear Board precedent.").

[19] As previously stated, prior to Buckeye filing for bankruptcy, Kazer testified that he was in discussions with Snyder Lance, the second largest snack food manufacturer and distributor in the country, about Buckeye's 29 sales routes in Columbus, Sabina, and Cincinnati, Ohio. Kazer explained that he contacted Snyder Lance about taking over these routes "because of the job that Buckeye was doing." (Tr. 358–359). Kazer did not provide any more information as to what he meant by that statement; however, it suggests that Respondent retains certain control and authority over routes that are sold to independent distributors to ensure that the routes are being properly handled.

Respondent points to the numerous routes it sold prior to and after the expiration of the collective-bargaining agreement to support its waiver argument. However, as stated above, the Board has held that prior changes, made with no cognizable fixed criteria, do not establish a past practice that the employer was permitted to continue post-contract expiration, even if earlier changes also occurred during contract hiatuses pursuant to the expired management rights provision. *E. I. du Pont de Nemours*, supra. In this case, there were no set criteria used to decide which routes to sell. Kazer testified the decisions to sell were based on what routes the distributors wanted to buy and whether Respondent believed that they could handle the routes.[20]

Regardless, I find that Respondent's waiver arguments, whether based on the management-rights clause in the expired contract, the arbitration decision which relied upon the management-rights clause, or the past practice that developed pursuant to the management-rights clause or arbitration decision, all fail under current Board precedent. As such, I find Respondent had a statutory obligation to bargain with the Union over the decision to sell the four routes at issue, and its failure to do so violates Section 8(a)(5) and (1) of the Act.

D. Respondent Had an Obligation to Provide the Union with the Information Requested on August 31, 2016

The General Counsel contends that Respondent had an obligation to provide the Union with the information it requested on August 31 related to the sales of routes at issue. It is well settled that an employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to a union that is the collective-bargaining representative of the employer's employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). This duty is not limited to contract negotiations but extends to requests made during the term of the contract for information relevant to and necessary for contract administration and grievance processing. *Beth Abraham Health Services*, 332 NLRB 1234 (2000). The standard for determining the relevancy of requested information is a liberal one and it is necessary only to establish "the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." Id. at 437. See also *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), and cases cited therein. Therefore, the information must have some bearing on the

[20] The General Counsel and the Union further argue that the Union's failure to demand bargaining over the prior sales does not constitute waiver because the 2016 sales were different, largely because they were located in and around Dayton, and Respondent had not sold Dayton routes in the past. The Union asserts that Routes 102, 104, 122, and 131 were some of the more profitable routes, unlike the routes sold in the past. The Union believes that part of the reason these routes were more profitable was because of their proximity to the Dayton distribution center, which reduced the transportation costs associated with those routes, as compared to the other routes sold that were located in outlying areas. The General Counsel and the Union argue that because of these differences, and the fact that Respondent never sold Dayton routes before, the Union's failure to bargain over the other routes is irrelevant to whether they clearly and unmistakably waived the routes at issue. I need not address this contention, because I have concluded Respondent has failed to establish a clear and unmistakable waiver.

issue between the parties but does not have to be dispositive. *Kaleida Health, Inc.*, 356 NLRB 1373, 1377 (2011).

Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information. However, where the information requested is not presumptively relevant to the union's performance as the collective-bargaining representative, the burden is on the union to demonstrate the relevance of the information requested. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). Where the requested information pertains to matters outside the bargaining unit and is not presumptively relevant, the information must be provided if the surrounding circumstances put the employer on notice as to the relevance of the information or if the union shows why the information is relevant. *National Extrusion & Mfg. Co.*, 357 NLRB 127 (2011). Where a showing of relevance is required because the request concerns non-unit matters, the burden is "not exceptionally heavy." *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). This burden is satisfied when the union demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra at 1258.

The Board has held that information requested pertaining to subcontracting agreements, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance. *Disneyland Park*, supra at 1258. Specifically, on the subject of subcontracting situations, the Board in Disneyland Park held that a broad, discovery-type standard is utilized by the Board in determining the relevance of requested information, and that potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. Id. In that regard, in *Disneyland Park*, the Board held that to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent to the employer under the circumstances. *Disneyland Park*, supra at 1258; Absent such a showing, the employer is not obligated to provide such requested information. The Board has also held that "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, supra at 1258 fn. 5; *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989); see also *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003).

In its August 31 letter demanding to bargain, the Union disputed Respondent's claims that Arbitrator Paolucci's decision gave it the authority to sell the routes at issue. The Union distinguished that case from the known facts about the routes at issue. The Union stated in this letter that in order facilitate bargaining, particularly in light of Respondent's reliance on the past arbitration decision which largely hinged on route profitability, the Union requested the following: (1) All documents that demonstrate the profitability of all of the Company's routes for the period from September 1, 2014 through August 1, 2016 so comparison can be made as to the profitability of all the routes on Route No. 104 and Route No. 122; (2) A copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold; (3) A description of how Mike-Sell's product is to be received by the entity to whom [R]oute No. 104 and Route No. 122 is scheduled to be sold; and (4) A copy of all correspondence, including electronic correspondence, between Mike-Sell's in the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016. Based on the wording of the letter, and the context in which it was sent, I find that the Union demonstrated the relevance of the information request, or

that the relevance of the information should have been apparent under the circumstances. As such, Respondent's failure to provide the requested information violates Section 8(a)(5) and (1) of the Act.

E. The Allegation That Respondent Failed to Bargain with the Union Regarding the Sale of the Company Vehicles to the Independent Distributors is Either Abandoned or Barred by Section 10(b) of the Act

At the hearing, the General Counsel amended the complaint to include allegations that Respondent violated Section 8(a)(5) and (1) of the Act when it sold the delivery trucks to independent distributors. The parties entered into stipulations limiting this allegation to Respondent's sale of a delivery truck to independent distributor Lisa Krupp's company BLM Distributing LLC on around September 4, 2016; and Respondent's sale of a delivery truck to independent distributor Charles Morris's company Big TMT Enterprize, LLC on September 11, 2016. (Tr. 222.)

An employer has a duty to bargain with the representative of its employees prior to making any changes in wages, hours or other working conditions if the change is a "material, substantial and a significant" one affecting the bargaining unit's terms and conditions of employment, and the General Counsel bears the burden of establishing that the change was material, substantial and significant. *Central Telephone Co. of Texas*, 343 NLRB 987, 1000 (2004). In this case, the Counsel for General Counsel completely failed to address this allegation in her posthearing brief. Similarly, the Union failed to present any argument or authority in support of this allegation. Thus, the allegation appears to have been abandoned. In any event, the General Counsel failed to carry the burden of proof and persuasion.

Even if the General Counsel had established the sales to be unlawful, there is the issue of whether the allegation was timely. As indicated above, Respondent contends the allegation over the sale of the vehicles is barred under Section 10(b) of the Act. Section 10(b) of the Act provides, in pertinent part, "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." It is well established that the 10(b) limitations period does not begin to run "until the charging party is on 'clear and unequivocal notice,' either actual or constructive, of a violation of the Act." *Ohio and Vicinity Regional Council of Carpenters (The Schaefer Group, Inc.)*, 344 NLRB 366, 367 (2005) (citation omitted). Under this standard, adequate notice will be found where the conduct was sufficiently "open and obvious to provide clear notice" to the charging party. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), enfd. sub nom. *East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007)), or where the charging party was "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred," and could have discovered the violation by exercising reasonable diligence. *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001). See also *St. George Warehouse*, 341 NLRB 905, 905 (2004) ("In determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence."). Respondent, in this case, shoulders the burden in establishing this affirmative defense. *Broadway Volkswagen*, supra.

On August 29, 2016, Respondent sent the Union a letter stating that Respondent will be eliminating two positions through the sale of Route 104 and Route 122, effective September 4, 2016. Respondent noted that the affected drivers (Gerald Shimmer #122 and Jerry Lake #104) would have an opportunity to rebid on September 1, 2016. On August 30, 2016, Gerald

Shimmer informed union steward Rick Vance that he was told that his delivery vehicle was being sold, and that he (Shimmer) needed to unload his truck and use a spare vehicle for the last few days of his route. (Tr. 114115). I find the timing of these notifications was sufficient to put the Union "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred" and that the Union could have discovered whether there had been a violation "by exercising reasonable diligence." Despite this notification, the Union failed to exercise reasonable diligence to determine whether the sale of this vehicle, or any other vehicles, at or around the time these two routes were sold constituted a violation. Consequently, I find that the allegation was filed more than 6 months after the Union had constructive notice of the alleged violations, and, therefore, should be dismissed as untimely.

CONCLUSIONS OF LAW

1. Respondent, Mike-Sell's Potato Chip Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the certified collective-bargaining representative for the following unit of Respondent's employees:

> [A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

4. Respondent has violated Section 8(a)(5) and (1) of the Act since July 2016 by failing to give the Union notice and an opportunity to bargain about its decision to unilaterally subcontract bargaining unit work to others outside the bargaining unit; and by failing to provide the Union information requested on August 31, 2016, that is relevant and necessary to its role as collective-bargaining representative.

5. By this conduct Respondent has engaged in unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as set forth above.

7. I recommend dismissing that portion of the amended complaint which alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing or refusing to bargain with the Union before unilaterally selling the delivery vehicles.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Affirmatively, Respondent shall, upon request from the Union,

rescind the sales of Routes 102, 104, 122, and 131. Respondent shall, upon request, bargain with the Union regarding the decision to subcontract or sell company sales routes. Respondent shall make any employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work associated with the sale of Routes 102, 104, 122, and 131 to independent distributors. The Respondent will compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed, and will file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall provide the Union with the information requested in its August 31, 2016 information request.

Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's Dayton facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 11, 2016. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

Respondent, Mike-Sell's Potato Chip Company, at its Dayton, Ohio facilities, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain with Union is the designated collective-bargaining representative of the following bargaining unit of the employees regarding their wages, hours, and other terms and conditions of employment:

> [A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent].

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Making unilateral changes to wages, hours, or other terms and conditions of employment of the bargaining unit employees without first providing the Union with notice and an opportunity to bargain, including, but not limited to, the subcontracting of bargaining unit work through the sale of company sales routes.

(c) Failing or refusing to provide the Union with requested information, such as the Information requested in the Union's August 31, 2016 information request that is relevant and necessary to the Union's role as collective-bargaining representative.

(d) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with notice and an opportunity to bargain before unilaterally making changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work through the sale of company sales routes.

(b) Upon request from the Union, rescind the sales of Routes 102, 104, 122, and 131 to independent distributors.

(c) Make affected employees whole, with interest, for any loss of earnings resulting from the subcontracting of unit work through the sale of Routes 102, 104, 122, and 131 to independent distributor, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

(d) Compensate affected employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Within 14 days after service by the Region, post at its facilities in Dayton, Ohio copies of the attached notice marked Appendix A.[21] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places throughout its Dayton, Ohio facility, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has closed certain facilities involved in these

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 25, 2017.

Andrew S. Gollin
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to bargain in good faith with International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales, and Service, and Casino Employees, Teamsters Local Union No. 957 (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All sales drivers, and extra sales drivers at the [Respondent's] Dayton Plant, Sales Division and at the [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over-the-road drivers employed by the [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by the [Respondent].

WE WILL NOT refuse to meet and bargain in good faith with your Union over any proposed changes in wages, hours, and working conditions before putting such changes into effect.

WE WILL NOT change your terms and conditions of employment by unilaterally selling our routes without notification to the Union or affording the Union an opportunity to bargain regarding these decisions.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its representational duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees about the sale of Routes 102, 104, 122 and #131.

WE WILL if requested by the Union, rescind the sales of our Ohio Routes 102, 104, 122, and 131 that we made without bargaining with the Union and assign those routes to unit employees.

WE WILL pay you for the wages and other benefits lost because of the sales of our Ohio Routes 102, 104, 122, and 131 that we made without bargaining with the Union, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement, a report allocation the backpay award to the appropriate calendar year(s).

WE WILL promptly furnish the Union with the following information requested in its August 29, 2016 information request letter: (1) documents showing the profitability of Respondent's routes for the period September 1, 2014 through August 1, 2016, so a comparison could be made between all of the routes to Routes 104 and 122; (2) a copy of the agreement between Respondent and the entity who is scheduled to purchase these routes; (3) a description of how Respondent's product is to be received by the entities purchasing these routes; and, (4) a copy of all correspondence between Respondent and the entity who is scheduled to purchase these routes.

MIKE-SELL'S POTATO CHIP COMPANY
(Employer)

DATED: _____ **BY** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/09-CA-184215 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E. Washington D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACE, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3733.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 9
550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Agency Website: www.nlrb.gov
Telephone: (513)684-3686
Fax: (513)684-3946

March 13, 2017

Jennifer R. Asbrock, Attorney at Law
Frost, Brown & Todd, LLC
400 W Market St, 32nd FL
Louisville, KY 40202-3363

Re: MIKESELL'S SNACK FOOD COMPANY F/K/A
MIKE-SELL'S POTATO CHIP COMPANY
Case 09-CA-184215

Dear Ms. Asbrock:

This is to advise that I have approved the withdrawal of the 8(a)(3) allegation of the charge, agreeing that there was insufficient evidence that the sale of the routes was discriminatorily motivated.

The remaining allegations that the Employer violated Section 8(a)(5) of the Act remain subject for further processing.

Very truly yours,

Garey Edward Lindsay
Regional Director

cc: John R. Doll - Doll, Jansen & Ford - 111 W First St, Suite 1100
Dayton, OH 45402-1156

International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales, and Service, and Casino Employees, Teamsters Local Union No. 957 - 2719 Armstrong Ln - Dayton, OH 45414-4243

Beth Meeker, HR Manager - Mikesell's Snack Food Company F/K/A Mike-Sell's Potato Chip Company - PO Box 115 - 333 Leo Street - Dayton, OH 45404-0115

ATTACHMENT
C

Date	Description	TKPR	Hours	Rate	Amount
7/28/17	Take telephone call from NLRB Attorney Boehm re GC's requested extension of time to respond to EAJA Motion; per NLRB Attorney Boehm's request - review, analyze, and suggest specific revisions to GC's Joint Motion for Extension of Time; email correspondence with NLRB Attorney Boehm re same.	JRA	.5	325	$162.50
08/08/17	Review and analyze GC's Response in Opposition to Company's EAJA Motion, as well as individual cases cited therein upon which GC relies; draft Reply in Support of EAJA Motion, including Introduction.	JLB	2.9	205	$594.50
08/09/17	Continue drafting Reply in Support of EAJA Motion, including Section I(A) re just and proper inquiry and Section I(B) re overbreadth; research supporting federal caselaw arising in 10(j)/EAJA context; prepare new Affidavit for Reply in Support of EAJA Motion.	JLB	9.6	205	$1,968.00
08/23/17	Continue drafting Reply in Support of EAJA Motion, including Section I(C) re distinguishing GC's cited caselaw; ensure proper Bluebook Citation format for all caselaw cited in Section I of Reply in Support of EAJA Motion.	JLB	3.3	205	$676.50
08/23/17		JRA	6.1	325	$1,982.50
08/27/17	Review and analyze GC's Response in Opposition to Company's EAJA Motion; review and revise Reply in Support of EAJA Motion, including Section I(A) re just and proper inquiry, Section I(B) re overbreadth, and Section I(C) re distinguishing GC's cited caselaw; confirm absence of federal caselaw involving 10(j) petitions filed and affirmative bargaining orders issued in cases with only stand-alone 8(a)(5) allegations (and no allegations of independent 8(a)(1) interference or 8(a)(3) anti-union animus and discrimination).	JRA	8	325	$2,600.00
08/30/17	Draft Reply in Support of EAJA Motion, including Section II re grounds for fee awards pursuant to 28 U.S.C. § 1927 and Court's inherent authority, and re rebuttal of GC's sovereign immunity argument; research and cite supporting federal caselaw.	JRA	6.5	325	$2,112.50
08/31/17	Draft Reply in Support of EAJA Motion, including Section III re reasonableness of fees and costs requested and rebuttal of GC's arguments as to excessive, duplicative, unspecific, and nonexclusive time entries; research and cite supporting federal caselaw.	JRA	10.0	325	$3,250.00
8/31/17	Review and analyze additional cases cited in GC's Response in Opposition to Company's EAJA Motion; prepare individual case-specific arguments to distinguishing GC's cited caselaw; research federal	CFB	4.6	315	$1,449.00

ATTACHMENT D

	caselaw and prepare brief argument re the "just and proper" element being weighed more heavily than does the "reasonable cause" element in in 10(j)/EAJA context.				
9/1/17	Research and strategize re oral argument request for EAJA Motion; research propriety of EAJA Motion referrals to Magistrate Judges and draft potential argument in opposition to referral in 10(j) injunction case.	JLB	3.0	205	$615.00
9/1/17	Review, revise, and finalize entire Reply in Support of EAJA Motion; ensure proper Bluebook Citation format for all caselaw cited in Sections II and III of Reply in Support of EAJA Motion; review and revise new Affidavit for Reply in Support of EAJA Motion; prepare new Affidavit Attachments, including itemization of fees.	JRA	9.4	325	$3,055.00
TOTAL			**63.9**		**$18,465.50**

EN01653.Public-01653 4851-6403-3870v1